

GRID-LOCKED **AFRICAN** **ECONOMIC** **SOVEREIGNTY**

***Decolonising the Neo-Imperial
Socio-Economic and Legal
Force-fields in the 21st Century***

EDITED BY

**Tapiwa Victor Warikandwa,
Artwell Nhemachena,
Nkosinothando Mpofu &
Howard Chitimira**

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Grid-locked African Economic Sovereignty:

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the 21st Century

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with the latest being, Luvhengo, U, Lekunze, JN (2017). “Identifying factors that influence small-scale farmers’ access to credit from commercial banks in greater Taung Municipality”, North West Province, South Africa. *J. Agribus. Rural Dev.*, 3 (45), 599-609 <http://dx.doi.org/10.17306/J. JARD.2017.00331> and Lekunze, J.N. & Lekunze, A.R., (2017), ‘Linking energy efficiency legislation and the agricultural sector in South Africa’, *The Journal for Trans disciplinary Research in Southern Africa* 13(1), a359. <http://dx.doi.org/10.4102/td.v13i1.359>. He is a member of Agricultural Economics Association of South Africa (AEASA), African Academy of Management (AFAM) and Faculty of Economics and Management Sciences Higher Degrees Committee of NWU. He supervises Masters and Doctoral students and he has been an external examiner for eleven Masters and a PhD thesis. He has graduated two Masters students since joining the North West University in 2016.

Table of Contents

Foreword	xxi
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Chapter One: Explosive Economic Minefields in Invisible NeoImperial Forcefields: An Introduction to Decolonising Economies in Africa	1
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*Artwell Nhemachena, Tapwa V. Warikandwa,
Nkosinotando Mpofo & Howard Chitimira*

Chapter Two: Anticipating African Economic Futures – Or Is It Time to Look in the Rear View Mirrors? Land Restitution, Unemployment and the Figure of the Posthuman	51
---	----

Artwell Nhemachena

Chapter Three: Re-Africanisation of Economies Through Ubuntu? Business and Kinship Obligations in Urban South Africa	97
---	----

Phefumula Nyoni & Sibonokuble Ndlovu

Chapter Four: The Land as Economy and Economy as Land: Towards a Re-Appraisal of the Political Economy of Land Repossession in Contemporary South Africa	113
--	-----

Gift Mupambwa & Mzingaye Brilliant Xaba

Chapter Five: Displacements in Colonial Zimbabwe: Contestations, Meanings, Consequences and Some Lessons	137
--	-----

Oliver Mtapuri & Everisto Benyera

Chapter Six: Agriculture and Africa's Development Agenda.....	159
--	-----

*Peter Mukarumbwa, Simbarashe Tatsvarezi
& Clifton Makate*

Chapter Seven: Growth Oriented African-Centred Agriculture, Cooperatives and Policy Reforms: Towards Poverty Alleviation and Food Security	191
<i>Moffat Ndou, Luvhengo Usapfa & Lekunze Joseph Nembo</i>	

Chapter Eight: Oil Discovery and Large Scale Land Acquisitions in Uganda: An Examination of the Implications for Livelihood in Selected Oil Village Communities	215
<i>Julius Niringiyimana, William Muhumuza & Murindwa Rutanga</i>	

Chapter Nine: Dispossessed and Marginalised Majorities: The Crises of Neo-Colonial Theft and Economic Exclusion in Africa South of the Sahara.....	263
<i>Shadreck Warikandwa</i>	

Chapter Ten: “Investors” or Looters? A Critical Examination of Mining and Development in Africa	291
<i>Gift Mupambwa & Mzingaye Brilliant Xaba</i>	

Chapter Eleven: Chinese Companies and their “Investments” in Africa: A Critique of the Viability of China’s Corporate Social Responsibility Approach in Zimbabwe’s Mining Sector	313
<i>Moment Tembo</i>	

Chapter Twelve: Multinational Pharmaceutical Companies (MPCs) and Mal-Drug Administration: Any Role for the State Government in the Era of Globalisation in Africa?	325
<i>Lere Amusan</i>	

**Chapter Thirteen: Reasserting the
Rightful Place of African Languages
in Sustainable Development 341**

Anneli Nghikembua, Hatikanganwi Mapudzi

✉ Nkosinobando Mpofo

**Chapter Fourteen: Towards the
Establishment of Robust Financial Market Laws?
An appraisal of the Decolonisation of
“Investments” in Zimbabwe..... 373**

Howard Chitimira

**Chapter Fifteen: Decolonising
“Investment” Regimes for Development
Purposes in Contemporary Africa 395**

Talkmore Chidede

**Chapter Sixteen: *Mukapuli and
Another v Swabou Investments (Pty) Ltd:*
The Namibian Experience on Assumed
Consumer Sovereignty in Credit Contracts 411**

Ndatega Victoria Asheela

**Chapter Seventeen: International Trade
Agreements and the Trade-Labour
Linkage Debate: A Southern African
Perspective – Part 1 421**

Tapiwa V. Warikandwa

**Chapter Eighteen: Promoting Economic
Transformation and Empowerment and
“Investment Security” in Namibia:
An Appraisal of the National
Equitable Economic Empowerment
Framework Bill..... 463**

Tapiwa V. Warikandwa ✉ Ndatega V. Asheela

**Chapter Nineteen: International Trade
Agreements and the Trade-Labour
Linkage Debate: A Southern African
perspective – Part 2 511**
Tapwa V. Warikandwa

**Chapter Twenty: The Ethic of
Ubuntu and Recent Developments
in the South African Banking Law..... 547**
Sipho Nkosi

**Chapter Twenty One: Decolonisation
and the Constitutional Right to Fair
Labour Practices: A Contemporary
South African Perspective 569**
*Tapwa V. Warikandwa, Artwell Nhemachena,
Nkosinobando Mpofo & Howard Chitimira*

Transnational corporations and Euro-American institutions are increasingly usurping the sovereignty of African states even as the African states are ironically being accused by Western media and thinkers of being weak, of failing to run economies and politics on the continent. The emergent New World Order will be dominated by Euro-American corporations and institutions that are already edging into positions superseding the African states. In this regard, the transnational corporations will increasingly become authoritarian, autocratic, hegemonic and brutal as was the case with corporations/chartered companies that ruled Africa at the beginning of colonialism. African states are denied economic sovereignty, particularly, via discourses that celebrate the supposed imperative freedom of the market and foreign “investors” that are increasingly dictating not only the economics but also the politics of African states. The African states are wrestled of their economic and political sovereignty. While some scholars erroneously contend that the logic, notion and principle of sovereignty originated from Euro-American sources, particularly the Westphalian order, it should be noted that precolonial Africans had their own forms of political and economic sovereignty. Further, it can be contended that sovereignty reduced to politics is in fact an impoverished version that does not speak to realities of precolonial Africans’ economic sovereignty – there is need to think not merely in terms of political sovereignty but *a fortiori* **political-economic** sovereignty. In this regard, fundamental to Africans are the imperatives of economic sovereignty such as existed prior to colonisation of the continent. Although some scholars assume that precolonial Africans did not have economies, let alone industries, there is evidence that Africans had industries such as mining, weaving, agriculture, and metallurgy as well as service industries in areas of health, education, commerce and social security. There are also erroneous assumptions in contemporary discourses on economic empowerment that precolonial Africans did not have knowledge including expertise in various sectors of industry when in fact it is the resilient neo-colonial projects that have consistently deskilled Africans. In this regard, Africans have never lacked the capacity to industrialise and develop - rather, they have been gradually deskilled, decapacitated and incapacitated by neo-colonial processes. In this respect, what Africa needs is not primarily capacity development - that erroneously assumes that Africans have never had the capacity - rather what is needed is recapacitation coupled with restitution and restoration of tangible and intangible resources that were looted since the enslavement and colonial eras.

Instead of furthering the processes of decolonisation, the contemporary emphasis on luring transnational corporations that are deceptively called

“investors”, catalyses the processes of recolonisation and neo-colonialism. Euro-American capital and corporations have always served as vanguards of re-colonisation in history - Africa and other regions were colonised through the medium of [chartered] companies such as the British South African Company, British East India Company, German West Africa Company, German East Africa Company, French West India Company and French West Africa Company. Despite the historical evidence that Africa was colonised through corporations or companies, some contemporary Africans have - via ideological interpellations - been made to believe that corporations are Africa’s indispensable saviours. The neo-colonial games wherein transnational corporations are fronted as “investors” are hardly made manifest in contemporary discourses. The hypocritical notion of the animated “market”, including ideologies about the “invisible hand of the market” which is in fact the invisible hand of neo-empire, has for long constituted the covert mechanism for recolonisation. In this regard, affording freedom to the “invisible hand of the market” has effectively translated to opening up African spaces to the dabblings of the invisible hand of neo-empire. Indeed the assumption that it is only the “invisible hand of the Western markets” that is good for Africa erroneously presupposes that precolonial Africans did not have markets of their own or their own commerce or trade for that matter.

In the light of the foregoing, this book critically interrogates the processes of economic recolonisation of Africa through trade and transnational corporations. It interrogates the contemporary discourses on decolonisation including the imperatives of decolonising the African economies and materialities. In other words, the book examines the possibilities of African political-economic sovereignty serving as foundational to political sovereignty and democracy. The book foregrounds material, including economic democracy: it shies away from focusing on mere ritualistic political electoral democracy. The assumption here is that, in Africa, material economic democracy should precede the simplistic political rituals that have, since independence, marked electoral democracy.

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Explosive Economic Minefields in Invisible Neo-Imperial Force-fields: An Introduction to Decolonising Economies in Africa

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It is no answer to blame Western colonialism. Many former colonies from Malaysia to Mauritius are doing just fine, after all – and in much of Africa, local people regard it as uncontroversially true that things were better under colonialism. But in any case, blaming colonialism doesn't answer the question of what needs to be done about Africa – the problem child continent – now. So the world has three choices; to put in place a long term UN mandate system – in effect recolonising the place; to allow private companies to do the same... (Johnson 22 May 2000).

The popular images of Africa in the West include the “dark continent” characterised by primeval irrationality, tribal anarchy, civil war, political instability, flagrant corruption, incompetent leadership and managerial ineptitude, hunger, famine and starvation... Africa is seen as a homogeneous entity comprising of uncivilised and heathen peoples who are culturally, intellectually, politically and technically backward or inferior... Ever since the slavery and colonial times, such images of Africa have persisted in the West and they still permeate the perspectives taken by the powerful Western media personified by editors, journalists, politicians and even academics. So much so that within the past decade, we have seen parts of the Western media campaigning for the recolonization of Africa... (Machira 23 December 2002).

The corporation, which was a revolutionary European invention contemporaneous with the beginnings of European colonialism, and which helped give Europe its competitive edge – has continued to thrive long after the collapse of European imperialism... It is estimated that in Africa between US\$1.2 trillion and US\$2.7 trillion has left the continent in illicit financial flows between 1980 and 2016 – roughly equal to Africa's current gross domestic product, and surpassing by far the money it receives from outside over the same period (Soni 25 October 2018).

Introduction

Although some Eurocentric thinkers like Johnson (22 May 2000) accuse African leaders of singularly running down [neo-colonial] economies on the continent,

other thinkers note that Euro-America has always thrived on creating misinformation about Africans and Africa (Machira 23 December 2000). Thus, while Johnson (22 May 2000) accuses African leaders of siphoning off public funds, of authoritarianism, of corruption, of presiding over the destruction of their “own national economies”, of neopatrimonialism and bigman syndrome wherein the big men aggrandise themselves in offices; other thinkers have different perspectives. Machira (23 December 2002) notes that western traders, missionaries, adventurers and explorers as well as the western media images of violence and crisis riddenness in Africa are designed to imply that Africans are naturally savage, warlike, violent and steeped in primordial tribal feuds. For Machira, commercial interests shape the portrayal of the world events – because the Euro-American global media is owned exclusively by Western corporate giants, they dictate what is reported and what is exported to African media about Africa.

Thus, recently, Donald Trump - who is the sitting United States of America president - is noted as having said people of Africa cannot even make matchsticks and therefore the Africans must be recolonised again for another 100 years allegedly because they know nothing about leadership and governance (BBC News 11 November 2016). This allegation was made without first of all contextualising the Africa of which Donald Trump was commenting. Ignored in the comment is the history of neo-enslavement and neo-colonisation which not only dispossessed and robbed Africans of their material resources but also deskilled them – robbing them of the entrepreneurial skills that they possessed during the pre-colonial period. Apart from the fact that Euro-American individuals, organisations and corporations are increasingly engaging in biopiracy - stealing African indigenous knowledge, including pharmaceutical knowledge about the famous Hoodia plant (Nhemachena, Mlambo and Kaundjua 2016), Euro-America is busy fomenting wars and instability in Africa – making the continent ungovernable (Azikiwe 14 May 2015; Turse 2010; 2012; Nhemachena, Warikandwa and Mtapuri 2017). So, Euro-America is increasingly deploying their militaries and secret intelligence officers on the African continent wherein they protect their states’ interests even as they justify their presence in terms of helping Africa fight terrorism – which terrorism is ironically partly a result of Euro-American fomentations including via the global military-industrial complex (Azikiwe 14 May 2015; Turse 2010; 2012). The resilient neo-colonial disablement of African economic sovereignty is well captured by Soni (25 October 2018) thus:

The legacies of colonial rule, both generally and in particular categories of colony, have and still continue to affect post-colonial economic development in Africa through the extraction of resources and illicit funds. The new agency for

this is the “corporation”, which has its origins in the East India Company sanctioned by the Queen Elisabeth 1 as a Royal Charter...Less well recognised, however, is that these “secret jurisdictions” and the bankers, lawyers and accountants who operate from these jurisdictions, actively encourage and support corrupt practices by facilitating illicit financial flows through an “offshore interface” between the illicit and licit economies...Financial market liberalisation has contributed to this problem by not addressing the “secrecy space” comprised by banking secrecy, non-disclosure of ownership of corporations and other legal entities, lack of accounting transparency for multinational companies...critically, the secretive legal instruments used by corporations and high net-worth individuals or tax-dodging purposes are also used for a wide variety of other criminal activities, including market rigging, insider trading, payment of illicit political donations, embezzlement, fraud and payment of bribes and commission kickbacks.

In the light of the resilient Euro-American dispossession, exploitation and economic manipulations of Africans, we argue that independence is still to come to Africa. The argument here is that just as the corporations or companies including the British South Africa Company, the German West Africa Company, the East India Company and so on invaded Africa, dispossessed, robbed and stole resources from indigenous people who were also exploited, the dominant corporations of the contemporary era are replicating the logic of the colonial era. Apart from funding the media portrayals of Africa as authoritarian, dictatorial, corrupt, failed, as hopeless, and as deserving recolonisation, the transnational corporations are also busy dispossessing and exploiting Africans who are suffering the scourge of the new scramble for the continent (see Warikandwa, Nhemachena & Mtapuri 2017; Southall *et al* 2009). Forgotten in the singular and erroneous condemnation of Africa as failed is the fact that even after independence, Africa has remained a neo-colonial minefield in various realms, including the economic one, that are controlled by the invisible neoimperial forcefields.

As in other minefields wherein landmines, that are remnants of war, litter forests and landscapes (Chapman 2010), neo-colonial economic minefields have remained in and continued to explode throughout “postcolonial” Africa. Just as there is a political economy of landmines (Chapman 2010), there is also the political economy of economic minefields that are traceable from the enslavement and colonial eras. The point here is that Africans are embattled in economic wars including economic violence that is traceable to enslavement and colonial eras. The sad thing is that war and violence have, in Eurocentric media and academics, been portrayed narrowly as a feature of politics and particularly African politics. In this regard, the economic wars and violence that Africans are economically subjected to by Euro-American institutions, individuals and

organisations are neglected such that there are illusions of economic peace on the continent of Africa. These illusions of peace also include depictions of the economically violent transnational corporations as peaceful and as responsible enough to fund peace projects on the continent of Africa. Thus, even as they fan and foment economic and political violence on the continent, transnational corporations, governments and institutions including the military-industrial complex also posture as the indispensable saviours of supposedly savage and “violence-prone” Africans. And often the political and economic violence of Euro-America is hidden in the discourses about the invisible hand of the market forces. Hardly recognised is that the invisible hand of the market is effectively the invisible hand of neo-empire that continues to define, own and control economies in Africa. In this regard, the violence emanating from market forces is effectively the violence of neo-empire’s invisible hand that Africa is ironically encouraged to free, in the discourses of free-market neo-liberalism.

Apart from erroneously presupposing that neo-imperial markets are neutral and level playing fields, the discourses on liberalising the markets ignore the Euro-American conjurations of such market force-fields. Neo-imperial markets are not necessarily independent of human conjurations. In fact the popularisations of free market ideologies in postindependent Africa were designed to free neo-empire from the constraints that African liberation governments would have put in place on behalf of the African masses. Neo-empire needed freedom and liberation to continue dispossessing and exploiting Africans in postindependent Africa and so it couched its own freedom in terms of the supposedly imperative freedom of the “invisible hand of the market”. The mistake on the part of postindependence era Africans was to think that the freedom and liberation that neo-empire celebrated in the discourses on free market forces was interchangeable with the freedom and liberation of Africans. In other words, African academics and policy makers suffered what we call free market bandwagonism – erroneously thinking that free markets discourses were synonymous with the newly won freedom and liberation of Africans, they joined the Eurocentric celebrations of free market policies and discourses that ironically liberated neo-empire such that it continued to prey on Africans. Even predators need freedom and liberation to feast on prey but the fundamental error for the cannibalised prey is to think that the freedom and liberation of the predator is synonymous with its own freedom and liberation (Nhemachena, Warikandwa & Mpofu 2018; Nhemachena & Kaundjua 2018). Euro-American conjurations of neoliberal market force-fields have invariably produced economic explosions and implosions in Africa – the so-called shock therapy has been administered to Africa not only during the neo-liberal era but since the enslavement and colonial eras when pre-colonial African economies were disrupted and plundered.

The problem is that the economic explosions and implosions have hardly been heard by African scholars that continue to celebrate neo-colonial economic establishments – including neo-liberalism - in Africa. While there is a lot of noise alleging that some states in the global south possess weapons of mass destruction, it is sadly hardly realised that the mass destruction of Africans is legitimised via ideologies and policies about free market forces, neoliberalism, resilient neo-imperial ownership and control of economies in Africa. In this regard, we argue that there are currently no **African economies** in Africa but what we have are neoimperial **Euro-American economies in Africa**. Currently, Africans are simply caretakers or babysitters of Euro-American economies that are in Africa – the economies do not belong to Africans and so they are not African in their essence. To address Euro-American economies in Africa as African economies is synonymous with a babysitter who mistakes the child of the master/mistress as their own. Thus, it should not be surprising that Eurocentric academic and technical institutions train Africans for serious babysitting business so that they take care of the Euro-American economies in Africa – they do not train Africans to disrupt and destabilise the baby or even to realise that the baby is not their own or that the baby has the genetic traits of the coloniser lest they refuse to babysit or to wash them. The point here is that at a global level, some Africans have been constituted into maids or babysitters [misleadingly called economic management] – and some are glad to be so - employed to take care of Euro-American economies. Africans are not allowed by the neo-imperial establishment to own and control economies even on their own continent. The education systems that Africans receive prepare and condition them for subserviency – for babysitting the economies belonging to other people, and not to own and control the economies. Thus, the xenophobia and Afrophobia that characterises contemporary Africans translates to a scenario where babysitters compete and fight one another, in this case to babysit Euro-American economies. Sadly, contemporary economics education trains Africans not necessarily to produce and persevere in struggles to produce commodities on their own – it rather trains them to be content with babysitting what belongs to other people from overseas.

Any African attempts to repossess ownership and control of the economies are met with preemptive neo-imperial vengeance and inducements of shocks including the engineering of coups, protests, postmodern revolutions, imposition of sanctions, embargoes and so on (Nhemachena & Kaundjua 2018). In this sense, Africa has increasingly become a battlefield not only in the political sense but also in the economic sense wherein economic violence is sanitised including through discourses on global competition and competitiveness ironically with the historically dispossessed, robbed and exploited Africans. Eurocentric discourses on competition and competitiveness of economies hide

more than they reveal because Euro-America knows that it did not develop because it was competitive but it developed because it robbed, dispossessed and exploited other people. If Euro-American economies developed due to dispossessing, robbing and exploiting Africans that were enslaved and colonised, it boggles the mind why the same Euro-Americans popularise discourses and ideologies about global competitiveness as the supposed key to economic growth. In any case, to insist on economic competition with the historically dispossessed, robbed and exploited is effectively to hide the injustices and criminality perpetrated by those that are now ironically championing discourses on competitiveness after having robbed and exploited others. In the same vein, for Euro-America to foreground the market and competition rather than foregrounding the neo-colonial dispossession, robbery, and exploitation of Africans is a foil to hide the skeletons in the cupboards of the neo-colonisers that would want the world to erroneously believe that they are where they are due to competitiveness and their own aptitude and abilities to manage and grow economies. Deceiving too are discourses to the effect that the neo-imperial countries that robbed, dispossessed and exploited Africans are rich countries – they are misleadingly addressed as “rich countries”, “developed countries”, “modernised countries” and “advanced countries” ironically ignoring the fact that they robbed, dispossessed and exploited Africans and other people of the global south (Nhemachena, Warikandwa & Amoo 2018). The point is that all these titles that are commonly used in textbooks, journal articles and in the popular media to refer to countries or states that colonised Africa do not acknowledge the history of colonial plunder, robbery, theft and exploitation – the erroneous assumption in the appellations to these states is that they are where they are because they worked hard and were competitive in world economic history. In short, if someone has robbed, stolen and exploited others, it is inappropriate to address the criminals as rich, developed, advanced, competitive, innovative and so on – the correct epithet has to be given to them. Similarly, it is inappropriate to refer to the African victims of enslavement and colonial robbery, theft, plunder and exploitation as “underdeveloped”, “developing”, “backward”, “barbaric”, “savage”, “uncivilised”, “poor”, “uncompetitive” and so on. Africa is not underdeveloped, backward, poor or uncompetitive – rather the continent is a victim of robbery, theft, plunder and exploitation. Education systems that use inappropriate epithets and thereby hide the history of robbery, plunder, theft and exploitation are in fact criminal systems of education in so far as they are complicit in the ongoing and resilient international economic criminality being perpetrated on Africans.

The question here is also why Euro-American corporations that come to plunder and exploit Africans are often simplistically addressed as “huge investors”, “large-scale investors”, “technologically advanced” and

“competitive”? The logic or otherwise of this can be likened to celebration of plunder and exploitation by someone simply because they are possessed with a big stolen phallus [even when the growth was based on stolen medicines or the phallus itself is big but a stolen one]. The question is would one simply address this as competitiveness and as advanced? Put otherwise, would it be logical for one to argue, as is often done in connection with small-scale African industries, that it is better to give tenders and opportunities to exploit African resources to foreigners supposedly possessing bigger phalluses and who are thus deemed to be more competitive and more able to ensure supposed productivity? The point here is that when Africa privileges big Euro--American transnational corporations - which are big because they have historically enslaved and colonised, robbed, plundered and exploited Africans - they are forgetful of the fact that the corporations are big precisely because they have cannibalised Africans. They are not necessarily big because they are more efficient, more productive or more competitive – but they are big because they are eating up Africans. Conversely, African industries and economies are small precisely because they are cannibalised – they are not small because they are not competitive, efficient or productive. In short the big is not *ipso facto* efficient and competitive or more productive but it is often big because of cannibalising others. In this sense, privileging and inviting big transnational corporations, erroneously deemed to be investors, to Africa risks infesting the continent with cannibalistic plunder – it is always necessary to examine why something is big and it is not advisable to be fascinated by the size alone – cannibals also become big.

In the light of the foregoing, we argue that the transnational corporations that are in control of economies in Africa are a minefield not only in terms of the mineholes that they leave when they mine Africa but also in terms of their battles against African ownership and control of the economies on the continent. Planted as chartered companies during the colonial eras, the corporations require demining if Africa is to recover its economic sovereignty that was stolen during the colonial era. Just as landmines continue to exist even after they are banned (BBC Future 22 March 2017), neo-colonial economic minefields continue to exist in postindependence Africa. The neo-colonial economic minefields including landmines continue to lie in wait for unsuspecting African victims seeking real decolonisation – the economic landmines also stop those that are on their way to genuine African economic independence or freedom. Thus, just as it is noted that 110 million military landmines are buried in 60 or so countries like Afghanistan, Cambodia, Myanmar, Libya, Syria and on the continent of Africa (BBC Future 22 March 2017), millions of economic landmines have been set up during the colonial era. While the United Nations and other international humanitarian organisations

have embarked on demining of military landmines, they have sadly ignored demining neo-colonial economic landmines many of which continue to deny economic sovereignty to the peoples of the global south. Because of the neo-colonial economic landmines and minefields, Africa remains an economic killing zone characterised by explosions, implosions and shrapnel in the political, economic and social realms. For this reason, it is not surprising that more Africans die from global economic structural violence than from direct physical violence (Nhemachena 2016).

In the light of the above, we argue that economic decolonisation must necessarily involve demining of the neo-colonial economic landmines. Decolonisation must involve demining of the neo-imperial forcefields that explain Africa's economic logjam. The fact that Africa has neo-colonial economic minefields including landmines is evidenced by explosions and implosions that occur each time Africans try to repossess ownership and control over their economies. When natives or indigenous people take back their land, by way of decolonisation, the economy gets exploded and imploded due to manipulations by the vengeful Euro-American global establishment. Before Africans can take possession of their mines and land, neo-empire administers preventive economic shock waves. For this reason, when Zimbabweans took back their land and made efforts to indigenise, (Mail & Guardian 11 August 2013), the economy got imploded and exploded: this constitutes evidence of neo-imperial economic landmines that have been planted in Africa. The challenge in this regard is that some African leaders think that Africa will get better or improve by sinking deeper into neo-colonialism and into the privation that is generated by the so-called private corporations that were established on the basis of the colonial robbery and exploitation. Thus, sadly, the preferred solution to economic implosions in Africa has been to privatise and sink further into privation that is inherent in privileging Euro-American private corporations. There is a paradox in the selling of African state enterprises on the assumption that such private corporations are better managers of the economy: Africa was colonised in the first place on the imperial presumption that colonial chartered companies were better at exploiting African resources – in fact Zimbabwe was, at the inception of colonialism, governed by the British South Africa Company. There is therefore a link between privatisation, privation and colonisation. The erroneous assumption is that Euro-American businesses grew due to privatisation, due to superior abilities to manage businesses and due to abilities to compete on the market (Austin 2012): the real reason why Euro-American corporations grew is that they benefited from colonising Africans. In this regard, decolonisation does not have to foreground privatisation, competition or the market. Decolonisation does not have to foreground stability of the neo-colonial economic order. It does not have to foreground questions

of mere access or inclusion. Colonisation was about granting Africans access to Eurocentric education, it was in this sense about including Africans as underdogs in the colonial system; colonialism was about granting Africans access to some colonial cities and amenities but as underdogs in the colonial system. For this reason the problems of colonialism and neo-colonialism cannot be resolved through discourses and policies on mere access and inclusion – these are not sufficient to decolonise Africa. Cannibals also **include** their prey in their bellies by consuming them, in other words, the prey is given **access** to the belly of the cannibal (Nhemachena, Warikandwa & Mpofu 2018) and this is nothing for the prey to celebrate. Inclusion and access do not amount to decolonisation – in fact they often amount to cannibalisation.

As if neo-colonial economies are themselves humanistic and humane, when African people and their states repossess their resources and demand economic sovereignty, Eurocentric institutions, individuals and organisations cry foul using supposed human rights abuses as a foil. They are quick to allege human rights abuses by the Africans that repossess their resources and demand economic sovereignty. In fact the Africans in question are often accused of destroying the neo-colonial economies – as if neo-colonialism was ever good and worth sanctification by Africans. Similarly, when Africans embark on decolonising the economies, the neoimperial order yells that they are disrupting education systems – forgetting that neo-colonial education systems are colonial and not worth sanctifying. In a context where foreign transnational corporations dominate the global economic scene, dispossessing and exploiting Africans (Esseks 1971; Junbo *et al* 2014), it is cause for wonder whose economy Africans must protect. While some scholars writing about decolonisation would want Africa to forget about identity politics and think about cosmopolitanism supposedly beyond nationalism, beyond [African] essentialism (Grosfoguel 2011), we argue here that identity is crucial to questions of decolonisation including repossession and ownership of African resources. Africans will increasingly be sacrificed in a world where identities are effaced: the danger is that where identities are regarded as hybridised, Africans would be made to carry the burdens of others in the mistaken belief that clear [African] identities no longer matter (Nhemachena 2016). Also, because colonisation was about exploding and imploding African identities, decolonisation must conversely be about reclaiming genuine African identities, nationhood, continenthood and African human essence. While some versions of decolonisation put primacy on questions of subalternity (Grosfoguel 2011) – we hold that colonisation was not simply about turning Africans into the subaltern: colonisation was *a fortiori* about theft, robbery, dispossession, looting, plunder and exploitation of Africans and these have different valencies to mere subalternism. When Africans saw colonialists and enslavers arriving; they did not simply see Europeans or

capitalists or the military or Christians or patriarchs or heterosexuals or males or race (Grosfoguel 2011) but they saw the criminality of robbery, theft, dispossession and exploitation that were perpetrated – in other words Africans saw criminals in the figures of the colonisers. Therefore, while some scholars contend that it is the idea of race that organises the world, we argue that the world is organised on the basis of the criminality of neo-colonisation and neo-enslavement of Africans. Race is not central to the organisation of the world but criminality is. The wealth that some have in the world is not a matter of race but it is a matter of the criminality of colonising and enslaving others. . A plea of criminality should not be mistaken for a plea of race/capitalism/patriarchy/Christianity/gender /domination. Similarly a charge of criminality should not be mistaken with a plea of privilege and domination – in other words, colonisation is not simplistically about privilege or subordination and superordination – colonisation is about the criminality of theft/plunder/robbery that occurred when Africans were enslaved and colonised. In this sense, nationalism itself is not necessarily an impediment to decolonisation because colonialism is essentially about neoimperial robbery/theft/plunder of Africans. Nationalism and continentalism help in organising the victims of neo-colonial robbery, theft and exploitation such that they can claim restoration, restitution and reparations – and this is why nationalism and continentalism are being deconstructed by Eurocentric scholars.

The point in the foregoing is that colonisation is not simplistically about hierarchies, domination, subordination or superordination or exclusion but it is essentially about neo-imperial theft, robbery, plunder, looting, dispossession, and exploitation of Africans. Even in the contemporary era transnational corporations continue to loot African resources, Eurocentrists continue to steal African indigenous identities in the process diluting the authenticity of African indigenous identities, disrupting and destroying kinship systems that are central to African resource distribution (Gaudry *et al* 2017; Bell 2014). Africans have since the enslavement era been subject to assimilation and inclusive taxonomies wherein the offspring of the enslaved, for instance, were automatically regarded as slaves (Wolfe 2006; Steinman 2016). In this sense, inclusion and assimilation served to vanish, eliminate, and extinguish indigenous claims to historical, epistemological, philosophical, moral, economic and political resources (Tuck *et al* 2013). Settlers prized hybridity as a way to eliminate indigenous people and replace them with settlers who would then see themselves as the rightful claimants to land and to indigeneity (Tuck *et al* 2013). The upshot of the foregoing is that Africans do not have to foreground discourses on inclusion, assimilation, hybridity of identities, flows, fluidity, becomings and so on in the struggles to decolonise. What is needed is to repossess economic and epistemic

sovereignty including ownership and control over African resources – all other discourses constitute what we call “cognitive decoys” designed to waylay and pre-empt African decolonial projects.

Firstly, it should be cause for wonder why Africans are celebrated, in contemporary Eurocentric scholarship, as becoming hybrids. The Africans are never celebrated, in Eurocentric scholarship, as becoming owners and controllers of their own economies, politics and other indigenous institutions. Secondly, Africans are similarly celebrated as subjects of inclusion but the inclusiveness is without ownership and control of African resources. Thirdly, Africans are celebrated as subjects of policies on access but it is access without ownership and control of African resources. Fourthly, Africans are celebrated as subjects of policies on equality but the equality does not include ownership and control over African resources. The point here is neo-empire is prepared to make every other concession that does not destabilise the core of the neo-imperial order – it grants peripheral concessions to Africans. What is at the core of the neo-imperial order is the retention [by colonialists] of ownership and control of African resources. This is what neo-empire protects and fights to retain while making concessions on other peripheral aspects like granting Africans sexual rights or sexual freedoms including gay and homosexual rights - so that they can entertain themselves with sexual lewdness while neo-imperialists secure ownership and control over African resources (Nhemachena and Dhakwa 2017; Nhemachena, Warikandwa & Amoo 2018). In other words, forced - often via threats of withdrawal of Western aid – to practice homosexuality, Africans would be increasingly busy mining one another's [unnatural] orifices while neo-empire is busy mining African material resources. Granted and made to focus on press freedom, freedom of expression, freedom of information and freedom of movement minus freedom to own and control their resources, Africans are kept busy fighting over ideological rather than over neo-imperial material economic plunder and dispossession. Thus, a lot of battles are being fought in Africa over liberal sexual freedom, press freedom, freedom of expression, freedom of information, freedom of movement, freedom of conscience and association but very few struggles are being fought over freedom to repossess ownership and control over African resources. Neo-empire is a master of cognitive diversionary campaigns. Whereas even gay and homosexual people would need to repossess their land and material resources, neo-empire ironically focuses not on forcing Africans to repossess ownership and control over their resources. Rather Africans are simply and hypocritically forced to become gay and homosexual: they are dissuaded from repossessing their material resources that were stolen by neo-colonialists. The scheme is to divert African attention from repossession of their land and other material resources – and to focus their attention on supposed sexual freedoms wherein Africans

would liberally sexually entertain one another while neo-empire continues to loot their resources. Paradoxically, the gays are supposed to be gay only about sexual entertainment and they are not supposed to derive their gayness/liveliness from repossession of ownership and control of their resources that were stolen by neo-colonialists.

Ironically, in terms of the Euro-American diktats, the gays are not supposed to derive their gayness/liveliness from their national identities/nationalism; they are not even supposed to derive the gayness/liveliness from their continental identities/continentalism; they are not expected to derive their gayness from the repossession of their resources including land and minerals; they are not supposed to derive the gayness from indigenisation/Africanisation of their economies but they are supposed to get the gayness from ultraliberal sexual entertainment. And it is only the sexual gayness that is enforced and foisted on Africa by neo-empire. In fact while neo-empire dissuades Africans from what it calls homophobia, the neo-empire stirs African national hatred, protests and revolutions (Nhemachena, Warikandwa & Mpofu 2018). In other words, neo-empire does not like Africans to have phobia for gays and homosexuals but it is paradoxically happy to see Africans hate their own nations, continents, communities, indigenous identities, pan Africanism, cultures, epistemologies and even their families. Neo-imperialism generates self-hatred [phobia for the self] among Africans even as it ironically dissuades the same Africans from hating homosexuals among them. Thus, African nation states are being portrayed as obsolete, African identities are destabilised, Africans are deemed to lack essential identities, Africanisation and indigenisation policies are opposed (Grosfoguel 2011). While it is often argued that indigenisation and Africanisation projects have benefited the elites and the leadership in Africa (Mail & Guardian 14 December 2016), we also note that discourses that criticise the pan African elite are in fact creative of what we call Afroelite-phobic sentiments similar to homophobic sentiments. In fact neo-empire is anxious to create phobia for radical pan Africanist leaders – African citizens are taught to be phobic about their leadership ironically even while neo-empire is dissuading Africans from being homophobic. Put in other words, the radical pan Africanist leadership have become neo-imperially more vulnerable to phobic sentiments than gays – gays and homosexuals are more protected from phobic sentiments than are pan Africanist elites and leadership. Sadly, the world has been cultured by neo-empire to be intensely Afrophobic even as neo-empire is ironically intensifying protection of gays and lesbians from homophobia.

Further to the foregoing, Africans are being taught to be phobic about their own states that are often summarily demonised, in Eurocentric scholarship, as failed states, weak states, neopatrimonial states, corrupt, obsolete and so on (Herbst 1996). In spite of the glaring fact that it is Euro-America that has failed

to restitute and restore neo-colonially stolen resources, and to pay reparations to Africans who were enslaved and colonised, it is ironically only African states that are targeted through discourses on state failure, corruption, neopatrimonialism and so on. Decolonial studies have to debunk the myths that it is African states and African people that have failed. Decolonial studies should also debunk the myth that it is Euro-Americans that brought ideas about economies to Africans – by extension, decolonial studies have to debunk the myth that Africans did not have economies before colonisation. Similarly decolonial studies have to debunk the myth that Euro-Americans created nations or states (Herbst 1996) in Africa – in other words, decolonial studies have to pay attention to the fact that Euro-America destroyed precolonial African states and nations. Therefore, what Africans need are not alternatives to African states or alternative economies as some scholars argue – Africans need restitution/restoration and compensation for enslavement and colonial crimes perpetrated on them. To exhort them to look for alternatives amounts to exonerating the neo-colonial criminals. It is inappropriate for scholars to focus narrowly on criticising and deconstructing African nation states, criticising borders and boundaries, criticising African sovereignty and autonomy – decolonial studies must *a fortiori* focus on restoration, restitution and reparations in the first instance because colonisation was essentially about theft, robbery and exploitation.

The upshot of the above is that academies are themselves minefields full of ideological landmines that require serious demining operations. Neo-colonial education has tended to hide more than it reveals. In short, neo-colonial education diverts African attention away from their core aspirations to exercise sovereignty over their resources. Much as Tandon (2015) writes that international trade is war against Africans, we argue that neo-colonial education is war against Africans. Unfortunately African students have to pay fees so that neo-colonial academies can engage in wars with their African essences including aspirations for political, economic and cultural sovereignty. Much as the neo-imperial economy including the neo-liberal economic order thrives by inducing shock therapies on Africa (Klein 2007), we argue that the education system induces shock therapies on Africans who are supposed to suffer amnesia about the enslavement and neocolonial robbery for which remedies are still outstanding. Africans are being fought on every front – economic, political, social, moral, ethical, legal, and spiritual – as neo-empire seeks to pre-empt autonomy and sovereignty on the continent.

Whereas precolonial Africans prized and fought for their economic sovereignty including their ownership and control of their cattle, land and minerals; some contemporary Africans are sadly happier merely working, if not slaving, for transnational corporations, civil society organisations,

nongovernmental organisations and other firms and institutions. Instead of reclaiming their resources through restitution and restoration, some Africans appear to be happier picking crumbs from the tables of neo-colonialists. They suffer amnesia about the brutalities that employment in neo-colonial industries entails. Some Africans are also forgetful of the brutalities of enslavement labour, that is, the brutalities of being employed as a slave without autonomy and sovereignty. They have become forgetful of the fact that colonial work constituted forced labour; that transnational corporations do not come to Africa to serve Africans but to make servants out of Africans. Also, they have become forgetful of the fact that Africans were historically deprived of their land, minerals, forests, water and cattle by way of forcing them to work on colonial farms and other industries (Nhemachena & Dhakwa 2017).

The neo-imperial economic landmines continue to explode and implode postcolonial Africa. When Euro-America continues not only to covet African resources but to also assassinate revolutionary African leaders seeking genuine independence, we graphically witness the neo-imperial forcefields on the continent. When the United States of America and Belgium sponsored a plot to assassinate Patrice Lumumba seven months after he was elected Prime Minister of Congo, they were apprehensive that the postcolonial Congolese people, with the assistance of their government, were about to recover full control over their resources (The Guardian 17 January 2011). When the French sponsored the assassination of Thomas Sankara who wanted to recover full control over Burkinabe African resources so as to utilise them to improve the living conditions of the Burkinabe (Olaniyan *et al* 2018), we again witnessed neo-imperial landmines exploding and imploding Burkina Faso. In contemporary Africa, the United States of America is noted as designing pieces of technology by which it is now surreptitiously manipulating events and conditions, including protests, coups and revolutions, in its favour (The Guardian 17 March 2011). In spite of the fact that Euro-America has failed to retribute, restore resources and pay reparations to Africans for enslavement and colonisation, Eurocentric media and academics singularly demonise African governments and leaders for poor governance, instability, incapacity, fragility and for supposedly failing to deliver basic services and security including human development (Gelbard *et al* 2015).

Similarly, when France forced its former colonies to pay colonial debts – on the arrogant assumption that the Africans benefited from being colonised (Pambazuka 25 September 2015), we witness neo-imperial forcefields operating in postcolonial Africa. When France forces newly independent African countries [including Benin, Burkina Faso, Ivory Coast, Mali, Niger, Senegal, Togo, Cameroon, Central African Republic, Guinea Bissau, Equatorial Guinea, Chad, Congo Brazzaville and Gabon] to deposit their reserves with the French

Treasury (Pambazuka 25 September 2015), we again witness neo-imperial economic landmines in postcolonial Africa. When France claims the first right to buy any natural resources found on its excolonies (Pambazuka 25 Sept 2015), we also witness neo-imperial forcefields in Africa. In the light of all these neo-imperial minefields and battles, it is cause for wonder why Eurocentric scholars and media are fond of singularly demonising African states and governments as failed, weak, corrupt, neopatrimonial and so on – the failures and weaknesses of Africans are coming from the Euro-American new world order that fortresses neo-colonialism.

In fact when France charges Africans the cost of being colonised (Huillery 20 June 2012), we witness the resilience of neo-imperial minefields on the continent of Africa. In spite of stealing, African resources, robbing and exploiting Africans during the enslavement and colonial eras, the French and other Euro-Americans would want the world to erroneously believe that colonisation was a burden to them and not to Africans. They would paradoxically want the world to believe that the African victims of neo-colonial crimes are benefiting from the neo-colonial robbery, theft, plunder, looting and exploitation. While the proponents of French colonial debt argue that Africans benefited from “massive investments” in education, health, infrastructure, agriculture etc. (Huillery 20 June 2012), we argue that colonisation was destructive to Africans and their institutions – colonisation was a minefield. The fact that France imposes sanctions, sponsors coups and assassinations of leaders of its excolonies who refuse to follow the colonial pacts (Lawal 19 December 2016; The Guardian 13 May 2015; Pambazuka 16 May 2018) exposes the fallacy of Euro-American free market policies. If Africans who were colonised by France are, as is the case, still forced to pay taxes to France, for instance, in the tune of 440 billion Euros per year (Lawal 19 December 2016), it does not make sense to glorify the figment of the free market or the figment of liberalism when liberty does not exist for Africans. When, instead of compensating the Africans whom it enslaved, France demands compensation for supposedly civilising the Africans who it enslaved (The Guardian 13 May 2015), it would not make sense to talk of free market policies, liberalism, human rights or democracy.

The neo-imperial economic minefields in Africa are operated by what Perkins (2004) calls “economic hit men” who are highly paid professionals that cheat countries out of trillions of dollars. The economic hit men rely on tools including international fraudulent financial reports, rigged elections, payouts, extortion, sex, and murder (Perkins 2004: 9). The point is that it does not make sense to talk of free market policies in a context where a handful of corporations and financial institutions command ever greater concentrations of economic and political power that assaults even the Eurocentric democracy and markets

(Korten 2015). The operations of the corporatocracy are well captured by Perkins (2007: 12 -13) thus:

This empire is ruled by a group of people who collectively act very much like a king. They run our largest corporations and through them, our government. They cycle through the “revolving door” back and forth between business and government. Because they fund political campaigns and the media, they control elected officials and the information we receive...The power base of the corporatocracy is its corporations. They define our world. When we look at a globe, we see the outlines of slightly less than two hundred countries...From a geopolitical viewpoint this model is archaic; the reality of our modern world might better be represented by huge clouds that encircle the planet, each symbolizing a multinational corporation. These powerful entities impact every single country. Their tentacles reach into the deepest rainforest and to the most remote deserts...The corporatocracy makes a show of promoting democracy and transparency among the nations of the world, yet its corporations are imperialistic dictatorships where a very few make all the decisions and reap most of the profits...contrary to our ideals, this empire is built on foundations of greed, secrecy and excessive materialism.

Thus, while on one hand they are refusing to restitute, restore and compensate Africans for enslavement and colonisation (Centre for Reparation Research 21 February 2018; Howard-Hassman 2004; Fortson 2004; Brophy 2004), the corporatocracy are on the other hand fomenting preemptive postmodern revolutions in the excolonies. Such postmodern revolutions are designed to topple African leaders particularly those that are fighting the neo-imperial system. While some Eurocentric scholars argue that claims for reparations, restitution and restoration reinforce dichotomies between races (Fortson 2004), we argue that it is absence of reparations, restitution and restoration that reinforces dichotomies and divisions such as those seen between African youths who are mistakenly blaming their leaders for want on a continent that is being transnationally looted. While some Eurocentric thinkers and leaders have argued that there is no alternative to neoliberalism, we argue, to the contrary, that there is no alternative to restitution, reparation and restoration as far as Africans are concerned. While Africans are urged, by Eurocentrists, to be “forward-looking” instead of looking up to reparations and restitution (Brophy 2004), we argue that in a context where the future is currently defined by Euro-America, Africans do not even have space to do their own forward-lookingness – Africans can only exercise forward-lookingness when they first of all get back their freedom including their ownership and control of resources. While some Eurocentric scholars argue that Blacks alienate

themselves and, through reparation claims, they see themselves as victims who deserve government payments (Brophy 2004), we argue that non-payment of the reparations is itself alienating and unjust. We argue that Black people rightly see themselves as victims of Euro-American enslavement and colonisation. In fact, Euro-American institutions including the media ironically encourage African youths to see themselves as victims of the misdeeds of their African leaders. The question is why then must Africans not also see themselves as victims of Euro-American enslavement and colonisation? Put in other words, the neo-imperial system that sponsors revolutions, protests, and even wars in Africa cannot claim that culture wars with neo-empire are bad; they cannot claim that African claims for reparations would divide the world or races; they cannot contend that claims for reparations would make Blacks consider whites as oppressors. The point here is that the neo-imperialists are the masters and mistresses of divisions, unjust wars, oppression, robbery, exploitation and plunder. Therefore, neo-imperialists cannot reasonably argue that divisions are bad particularly when Africans claim restitution and reparations for colonial disposessions and for enslavement. The issue here is that “global peace” and “unity” have come at great material costs to Africans who have neither received the long overdue restitution nor reparations for enslavement and colonisation. This observation dismisses the grandstanding by Euro-Americans and their institutions that claim to be masters and mistresses at the centre of sponsorship of global peace initiatives.

The paradox that is surfaced in the above is that Western media, politicians and academics take pleasure in fomenting and encouraging protests, revolutions and wars among Africans so that they fight one another. However the same people, organisations and institutions are quick to argue that African claims for restoration, restitution and reparations are divisive, racial, and retrogressive. In North Africa for example, Euro-American media took pleasure in reporting and even promoting revolutions and protests by African youths against their own African leaders (Khan *et al* 2016). African leaders, particularly those that fight the neo-imperial system, are consistently and singularly blamed for economic crises on the continent, for poor living conditions, for unemployment among African youths, for lack of economic opportunities and for lack of political freedom (Khan *et al* 2016).

We liken the logic of the intraAfrican fights to autocannibalism/autosarcophagy/autophagy or a form of consumption of the self, albeit induced (Christon 2015; Libbon *et al* 2015; Glick *et al* 2010; Lin *et al* 2013; Mizushima 2007; Alirezaei *et al* 2010; Ulamek-Kozioł *et al* 2013). Autocannibalism is a form of psychiatric illness, degeneration related to self-harm behaviour and it can also be induced by starvation or desperate conditions of absence of food (Glick *et al* 2010; Lin *et al* 2013; Mizushima 2007; Alirezaei *et*

al 2010). To induce autocannibalism and intraAfrican desperation and fighting, colonialists destroyed and burnt down African granaries (Ilife 1990). In the contemporary era, Euro-American transnational corporations induce intraAfrican fighting by strategically withdrawing food and other commodities from the supermarkets – this induces African subjects to fight their leaders. There has also been the retrenchment of workers during the neo-liberal era – for this reason the neoliberal era has been accompanied by increases in protests, demonstrations, and strikes. In spite of the unreliability and impetuosity of the transnational corporations and the emblematic private sector in Africa, Euro-American institutions and states often force African states to privatise economies. In this regard, Khan *et al* (2016) note that the common characteristic in pre-Arab Spring revolution Algeria, Morocco, Tunisia and Libya is that the states played significant roles in the functioning of the economies – the states controlled the banks, the industries and so Euro-American corporations were unhappy. Khan *et al* (2016: 3 – 5) note that:

...both Algeria and Morocco saw the birth of protest movements that contested the most authoritarian aspects of their political systems and the consequences of their economic policies. These movements demanded sweeping reforms to make the political system more inclusive and the decision-making processes more transparent. They also called for economic reforms to provide broad-based growth and much needed jobs...The Libyan revolt that exploded in 2011 was a revolution for dignity and a quest for political freedoms that had a minimum basis in economic grievances...

Although African leaders have been singularly blamed for rising levels of unemployment, we argue that unemployment is not a sole product of African misgovernance. Unemployment is not simplistically a product of African states' failure but it also results from the global emergence of what is called post-industrial society encompassing a change in economic focus from goods to services (Gershuny 1997). For instance, Bell (1976) predicted a vastly different society developing – one that will rely on the economies of information rather than the economics of goods – with new constraints and new questions. In such post-industrial workplaces the key feature of working time within knowledge and other workplaces is unpredictability, creating culture that seeks to insert acceptance of unpredictability as a new standard (O'Carroll 2015). It is argued that the post-industrial society is an information society where there is the exchange of information of various kinds of data; instead of a society based on the labour theory of value, the central idea in the post-industrial society rests on knowledge theory of value (Bell 1976). However, bearing in mind the fact that every industry is located on land, we argue that African struggles to repossess

their land are not misplaced or outdated even in the context of the so called post-industrial society.

Although there is a lot of impatience with some decolonising African states that are often singularly blamed for unemployment and other economic problems, we note that de-industrialisation, and the attendant increase in unemployment, are not peculiar products of African states. De-industrialisation is a result of industrial “rationalisation”, globalisation and economic recessions, de-industrialisation results from exposure of the African national economies to world market forces (Nel *et al* 2001; Mkandawire 1988; The Economist 7 November 2015; Grabowski 2015; International Food Policy Research Institute 21 May 2014). While globalisation contributes to and causes de-industrialisation (Kolmeyer 2009), it is sad that some thinkers would singularly blame decolonising African states for de-industrialisation (Zimbabwe Situation 2 May 2015; Daily News 4 January 2013). Indeed there was deindustrialisation at the inception of colonialism when precolonial African industries were destroyed by colonialists (Roy 2000; Nhemachena & Dhakwa 2017). In view of the foregoing, we argue that enslavement and colonisation were not forms of civilisation, progress, development or modernisation – precolonial Africans had their economic, political, legal, social and cultural institutions which were pillaged, plundered and destroyed by colonialists. Colonisation was a form of terrorism and not civilisation, progress or modernisation. Neo-colonisation is similarly a form of terrorism and not civilisation, modernisation, progress or development. There are economic, political, social, cultural and legal forms of terrorism that are being perpetrated on Africa.

Economic Terrorism and the Ongoing Destabilisation of Africa

Economic terrorism started during the enslavement and colonial eras when Africans were not only dispossessed and robbed of their resources but also exploited in colonial and imperial industries. In this respect, we argue that the neo-imperial system falls into the same category as Boko Haram and the Islamic State of Iraq and Syria (ISIS). All of them perpetrate terrorism- whether political, religious or economic - on the peoples of the world. Terrorism happens when neo-empire imposes sanctions on states in the global south – sanctions are a form of terrorism in political and economic senses (Gono 2008). Also, precolonial African industries were destroyed and pillaged and African land and mines were stolen by colonialists. African weaving industries were destroyed and pillaged in the colonial economic terrorism. Currently African indigenous knowledge is subjected to biopiracy by the transnational corporations. As Damon (1986) notes, African economic sovereignty is at stake and this is due to neo-imperial economic terrorism. Unfortunately, Africans have had to bear

with neo-colonial terrorism for centuries – and the terrorists and dissidents have the audacity to consider themselves as civilisers, developers and modernisers.

From directly capturing African bodies and minds for purposes of enslavement and colonisation, the neo-imperial order is building up technological ways by which to enhance their control and ownership of African economies. The technologies enhance neo-imperial action at a distance and by so doing they enable neo-empire to destabilise economies in African countries that refuse to cooperate with neo-empire. Cognisant of the ways in which some technologies are used to destabilise African political and economic sovereignty, some states are claiming digital/cyber sovereignty as an extension of political and economic sovereignty (IPI Global Observatory 2 December 2016). In this regard, it has been argued that digital tsunamis are poised to engulf human beings and that internet wizardry is rising – there is technology led restructuring of African politics and economies (The Guardian 4 June 2017). It is also noted that crypto- anarchists and crypto-currencies are set to bypass the African nation states – there is the rise of the bitcoin with no central [African] authority controlling value and supply; there is also the rise of currencies that operate independent of [African] governments and cannot be easily taxed; the currency undermines [African] central banks' control over money supply (The Guardian 4 June 2017). Understood in the context of the emergence of government cloud services at the intersection of electronic government and cloud computing (Irion 2012), these new technological developments are meant to tear apart the economic and political sovereignty of African governments. The cloud services are virtual, dynamic, and potentially stateless, they are a platform for “open government”, interagency cooperation but they threaten data sovereignty which is a crucial dimension of [African] national sovereignty (Irion 2012). The paradox here is that even as African governments are losing control over their data sovereignty, economic and political sovereignty (Irion 2012; Wong 2010), we are told that the world is getting into an information society or a post-industrial society where information matters more than physical raw materials.

Based on digital technologies with a business model based on digital goods and services, the emergent digital economy covers a number of emergent phenomena including platform economy, the gig economy, the sharing economy (Bukht *et al* 2017) but there are taxation issues in the digital economies (Boccia *et al* 2016; Corkery *et al* n.d.; Olbert *et al* 2017). National tax laws cannot do their job and the global companies especially the digital multinationals are easily able to elude higher taxing jurisdictions. Capital flows fluidly in a digital economy but there is disruption of taxing patterns – there is the rise of stateless income by multinational corporations. The net result is nullification of tax liability whilst retaining the full value of economic transactions (Corkery *et al* n.d.). Underscoring the destabilisation of African states and governments via

the digital economy, Sassen (1998) observes that the internet and digital economy favour the emergence of non-state centred governance mechanisms which have transformed the meaning of national territorial sovereignty while allowing private appropriation. There is the formation of privatised firewalled corporate networks on the worldwide web.

Thus, with the emergence of electronic commerce and digital economies, [African] national sovereignty is embattled, states cease to have control in their territories, national governments face challenges in managing international trade and finance, in collecting taxes, controlling domestic money supply, in addressing domestic social and cultural needs (Wong 2010; Basu 2012; Third World Network 2017; Leon 2015; Pak 2004). In this context, national sovereignty has been usurped by the International Monetary Fund and the World Bank that ensure nation states comply with the rules of the neo-colonial market. Also, the World Trade Organisation has gained more power *vis-a-vis* African states sovereignty – it provides global decision making structure for setting and enforcing rules in relation to “free” international trade. When electronic money/digital cash is adopted, central banks all around the world would play no significant role in regulating the economy – monetary policy becomes a preserve of global monetary markets and institutions (Wong 2010). Thus, apart from losing the right to tax citizens, African states are wrestled, by global digital corporations, of the public responsibility of geo-mapping and other statistical activities. Further stressing the destabilising effects of the digital economies, Third World Network (2017) notes that digital networks or platforms are mostly global, corporate-owned, and almost all of them are centred in the United States of America. Although some thinkers (Meltzer *et al* 2018; Ponelis *et al* 2015) present the internet and digital economies as universally beneficial, Hathaway (2014) notes that the internet was created in the USA and so the USA is dominating ICTs and acting in its own interests. In this regard, developing countries are urged to reconnect their understanding of digital issues to geopolitics (Third World Network 2017). Thus, while thinkers like Novitske (12 February 2018) note that users of digital economies can send payment to friends, pay their bills, add money to their cell phones just via texting the mobile chat robot on social media platforms, it is noted herein that the digital economies have downsides for Africans and their states.

In a context where the African nation states are threatened with disappearance; where there is erosion of distinctions between work and leisure and where there is gradual disappearance of traditional industries, it is not surprising that there are already debates about postdevelopment, postgrowth and degrowth. The emergent postgrowth, degrowth, post-industrial and post-Fordist societies (Hirayama *et al* 2018; The Guardian 3 July 2017; Chertkovskaya *et al* 2017) entail flexibilisation of labour markets with the attendant increased

risks and uncertainties with respect to employment and income. Although “Euro-modernity” is portrayed as focused on growth, development and progress (Chertkovskaya *et al* 2017; Ruth 2017), we contend that the “Euro-modernity” was not necessarily about growth, progress and development as far as Africa is concerned. “Euro-modernity” has been about plundering, robbing and exploiting Africans – it has not been about growth, progress, civilisation, modernity or development in Africa. Thus, while discourses of degrowth, postgrowth, post-Fordism speak to problems of overproduction and overconsumption, we argue that Africans’ problems have never been about overproduction or overconsumption – rather their problems have been about neo-enslavement, neo-colonisation, dispossession, robbery, plunder, looting and exploitation by transnational corporations and neo-imperialism.

It is noted by some authors that contemporary degrowth and green movements address the growth of human consumption driven by economic growth, development, population growth, and the impact of resource extraction (Weyler 2014; Latouche 2004; Jakob *et al* 2014; Latouche 2007; Martinez-Alier *et al* 2010; Blewitt *et al* 2014; Kallis 2015; Azam 2017; Alexander 2011; Ferguson 2018; Alexander 2017; Green European Foundation 2013). Instead of focusing on restitution and restoration of what belongs to indigenous people, Eurocentric concerns are focused on supposed “green growth” and “more efficient” use of natural resources (Jakob *et al* 2014).

The point in the foregoing is that arguments about degrowth, post-development and postgrowth erroneously assume that “Euro-modernity” brought about growth, development, progress and civilisation to Africa. The arguments erroneously assume that precolonial Africa did not have growth, or notions of growth, progress, development – they erroneously assume that precolonial Africa did not have industries, money, work and leisure. Thus, some scholars would be quick to erroneously connect degrowth, postgrowth and postdevelopment to local African communities, to grassroots innovations and alternatives – they mistakenly consider degrowth, postdevelopment and postgrowth as relocation, as giving power back to grassroots communities (Asara *et al* 2015; Azam 2017). Instead of focusing on restitution, restorations and reparations; degrowth, postgrowth and postdevelopment proponents foreground futuristic alternativism. They focus on finding alternatives to capitalism and alternatives to economic thinking; they focus on redistribution [rather than economic growth] – including cohousing, eco-communes, alternative food networks, producer-consumer cooperatives, communal kitchens, health care, elder care and child care cooperatives. These alternatives are often supported by new forms of exchange such as community currencies, barter markets, time banks, financial cooperatives, ethical banks, replacing wage labour with voluntary activity - the alternatives do not have a built in tendency

to accumulate and expand and they are less resource intensive (Kallis 2015). We argue that assuming that “Euro-modern” economies have brought about growth, progress and development would be scandalous to African people who have been dispossessed and exploited by the Euro-American colonialists that are now ironically claiming that they brought progress, civilisation and development to the victims of their dispossession and exploitation.

Although some scholars argue that the economy has grown very large and has exceeded its thresholds point beyond which further growth is uneconomic (Alexander 2011), it is important to examine the scholars’ loci of enunciation because obviously they are not speaking from an African and Afrocentrist point of view wherein the enslavement, colonisation, dispossession and exploitation of Africans would feature. Although some scholars argue that it is no longer necessary to assert and defend indigenous property rights but to focus on welfare objectives such as eliminating poverty, lessening inequalities and protecting the environment, we contend that it is imperative to restitute and restore neo-colonially stolen resources. In this regard, postgrowth arguments for voluntary simplicity, downshifting, anti-consumerism, post-materialism, simple living, seeking nonmaterialistic sources of satisfaction and meaning (Alexander 2011) – do not address African problems and challenges. There is also a paradox in that while on one hand African leaders who support decolonisation are accused of slowing down economic growth and productivity, on the other hand degrowth, postgrowth, postdevelopment movements in Europe are campaigning precisely for slowing down growth, consumption and production (see Green European Foundation 2013; Alexander 9 August 2017; The Guardian 19 September 2012).

Hidden in much of the debates about degrowth, postgrowth and postdevelopment is the connection that the envisaged postgrowth society has with the misanthropism of neoMalthusianism. As Alexander (2017) observes, postgrowth economics have strong connections with the Malthusianism that argues for limits to growth of the population – in this sense, postgrowth and degrowth movements are neoMalthusian and therefore misanthropic – they prefer biocentrism to anthropocentrism, they prefer the environment including land to human African beings. Whereas conventional economics see population growth as a good thing providing labour and consumers to stimulate economic activity, degrowth, postgrowth and postdevelopment thinkers’ fundamental question is whether the planetary ecosystem can sustain large population (Alexander 2017). Whereas technological optimists including proponents of green economic growth argue that technology can enhance productivity for the future economy to sustain the population growth, degrowth and postgrowth proponents argue otherwise.

Therefore, some scholars argue that green economy and the associated smart growth contribute to poverty reduction, equity and environmentally centred growth – a green economy is low carbon, resource efficient and socially inclusive (Schulz *et al* 2014). However, as noted above, the challenges that Africans have are based on neo-enslavement and neo-colonisation including plunder, robbery, looting and exploitation of African resources. These challenges would require different sets of responses and solutions that are not similar to degrowth, postgrowth and postdevelopment interventions. Instead of focusing on restitution and restoration of resources that were looted from Africans, green growth and bio-economies (Lyons *et al* 2014; Cavanagh *et al* 2017) simply catalyse renewed support for sustainable development in the context of global environmental and economic crises. We note herein that development cannot be sustainable if it is premised on the neo-enslavement and neo-colonial dispossession, plunder, robbery and exploitation of Africans. In this regard, we argue that the major problem is that the world has focused on the so-called sustainable development, green revolutions, on biodiversity, on climate smart agricultural crops (Cavanagh *et al* 2017), on green growth, on postgrowth and degrowth and ignored the historical neo-colonial dispossession, robbery, looting and exploitation of Africans.

A number of solutions are being proposed for contemporary problems as seen from the neo-imperial perspective. Some propose that the world needs a postcapitalist economic change entailing the building of a supposedly more equal society – they hold that the information society will be key in destroying economies based on market and private ownership (Mason 2015). Others hold that the postcapitalist society will be capable of advancing standards, liberating humanity from work, and developing technologies to expand freedoms including futures that are free of work or workless (Von Nick *et al* 2016). Some scholars and thinkers propose the sharing economy as an alternative to capitalism (Schor 2014; Richardson 2015; Woskow 2014) but such solutions ignore the neo-colonial dispossession, robbery and looting that have been and are being perpetrated on Africans. The neo-colonial dispossession, looting and robbery cannot be resolved through sharing economies or abolishing the market or through postcapitalism or degrowth and postgrowth. Also, in so far as the sharing economy is based on digital innovations, digital platforms, and humanitarianism (Woskow 2014; Richardson 2015; Independent 12 February 2017), it suffers the same critiques levelled against digital economies: digital economies effectively deny economic, social and political sovereignty to African states and governments.

Chapter Outlines

Artwell Nhemachena's chapter two focuses on the emergent global workless societies, dominated by humanoid robots and Artificial Intelligence. He argues that the emergent workless societies cause one to wonder what the future will be like for Africans who were historically dispossessed of their land, minerals, cattle and other resources. Landless and workless, African futures are not bright. The contemporary Eurocentric assumptions that Africans can rely on employment rather than on repossessing their land are ill-founded. They are ill founded because the jobs are in fact being taken over by humanoid industrial robots that are replacing human employees. Nhemachena argues that because African academics do not teach anticipation studies or studies about expectations, some Africans are ill-equipped to anticipate their futures. Foresight studies would assist Africans in planning their futures in the light of their past and present. Because of absence of foresight and foresight studies, Africans would have difficulties in mapping their futures. The argument in this chapter is that without land and without jobs, Africans will in future become more precarious as humanoid industrial robots proliferate and takeover the jobs. In the emergent workless societies, African governments and states will disappear, as they will have no one to tax for revenue. In the workless societies, Africans will have little, if any, motivation to pursue education. In this sense, a workless society will also be a deschooled stateless society. Thus, the emergent societies will be stateless, governmentless, landless and jobless or workless - Africans will thus be destined for extinction.

Chapter three is authored by Phefumula Nyoni & Sibonokuhle Ndlovu. This chapter is written in light of the challenges, which have emerged due to the failures of neo-liberalism, such as unemployment and poverty as well as the perceived incompatibility between kinship and business obligations, especially, within the post-colonial era. This aspect is linked to the failures of neo-liberalism and related promises of large scale "investments" by multinational companies. Whilst such failures of neo-liberalism are more pronounced in cities, research has shown that they have historically equally featured in peripheral South African towns such as Ntabankulu. The situation has been worsened by the neo-liberal philosophy that has tended to promote the capitalist tendencies that have historically been responsible for plundering, marginalising and alienating African values and practices. Of interest in this chapter are the ways in which groupings of African-owned small businesses have emerged in dealing with the dictates of capitalism. In positioning their initiatives as sources of livelihood, African business owners have had to strike a balance between business and kinship obligations.

Gift Mupambwa & Mzingaye Brilliant Xaba's chapter 4 observes that most South Africans, especially radical/ pan-Africanists believe that all land belongs to Black South Africans, and that land should be returned to Black people, who are the rightful owners, regardless of the consequences. Land was at the core of colonisation that included land dispossession, and therefore, radicals / pan-Africanists see land repossession, as the core of decolonisation and the return of the dignity of Black people. Most importantly, land is also related to access to the country's wealth, and therefore, the redistribution of land to Black communities is seen as the redistribution of the country's wealth to the rightful owners (Black communities). "Land reform" in South Africa has been clouded by a neo-liberal rhetoric (excuses) and economic terms wherein imperatives of commercial agricultural productivity have been used as criteria for success and as a means to dissuade Pan-Africanists, by defusing more radical and meaningful redistribution of land. There is also a sickening use of private property language by neo-liberals and international criminal elements (including some foreign governments). There is the argument that a radical land restoration would scare away "investors": this is however a scare tactic to brush aside the Black pain and to criminalise pro-poor, grassroots land reclamation groups. They note that even the African National Congress (ANC) government has succumbed to such neo-liberal rhetoric as evidenced by their markets-based approach to land, their fear to use state powers to exercise their expropriation powers in Section 25 of the Constitution. The authors further argue that Pan-Africanist groupings are much more concerned with the return of stolen land, which return is not synonymous with mere "land reform".

In chapter five, Oliver Mtapuri & Everisto Benyera explore the displacements suffered by Zimbabweans in colonial British Rhodesia – they argue that the displacement was not only a physical process of moving families and communities from point A to point B but it was also a process of epistemological, linguistic, cultural, jurisprudential and ontological displacement. They note that a European epistemology was imposed as part of the colonial project which displaced the centuries-old African epistemology which is yet to be rediscovered and inaugurated. By linguistic displacement and dispossession, they refer to the way in which African languages and ways of communication were marginalised and substituted by mainly English which till this day is Zimbabwe's main language of government, business and education. The authors argue that English language gained so much ontological density that the ability to proficiently speak the language is viewed as a mark of smartness and intelligence. African languages such as ChiShona, IsiNdebele, ChiChewa, ChiVenda and XiTshonga are becoming marginal languages in their home country. They further observe that the colonising European/Western culture has become the dominant global culture and in the absence of cultural

loyalty, certain Zimbabwean cultures have been displaced into oblivion. Regarding jurisprudential displacement and dispossession, the authors' contention is that colonialism in Zimbabwe replaced indigenous legal systems and ways of conceptualising right and wrong, perpetratorship and offendership and (in)justice. The forced imposition of the Roman Dutch law, they argue, amounts to the displacement and replacement of local legal systems which resulted in the current misalignment between the people of Zimbabwe, the land and the laws used to normalise human relations. Finally, by ontological displacement and disposition, they refer to the removal of local hierarchies of knowledge, power and respect, among other attributes and their replacement with an imposed colonial order instituted by white males acting on behalf of the English Queen. The totality of these dispossessions and displacements amounted to theft of Africans' *beinghood*.

Chapter six is authored by Peter Mukarumbwa, Simbarashe Tatsvarei & Clifton Makate. The authors note that questions have been asked concerning the emergence of new agricultural development powers in South-South Cooperation (SSC): it has been asked whether they serve African needs or rather they are a disguised new form of imperialism. The role of China, Brazil and India in fostering new development cooperation in Africa has challenged the dominance of Western countries. The northern development aid has been accused of perpetuating the legacies of colonialism through imposing conditionalities emanating from unequal international relations. The authors note that other scholars view SSC as a new form of imperialism meant to loot resources from the African continent. Nonetheless, this debate is inconclusive as some researchers argue that Foreign Direct Investment (FDI) from developed country "investors" actively contribute to host country food security by increasing the land used for crop production in the host country. Thus, global agribusinesses in Africa continue to reflect the dominant trends in contemporary agricultural development that promote market penetration, capital accumulation and the integration of smallholders into existing forms of market accumulation.

In chapter seven Moffat Ndou, Luvhengo Usapfa & Lekunze Joseph Nembo argue that food security in Africa has remained a challenge due to agriculture not being growth oriented. They further argue that the challenge lies also with the approaches used, policy strategies, level of technology, infrastructure, political instability, resource endowment and governments' priorities. The authors note that African nations cannot afford to ignore smallholder agriculture as they are crucial to employment, human welfare, and political stability; and there exists an emerging shift in paradigms that growth in this sector is constrained by a number of structural policy stances. Although the notion of smallholder agriculture may vary across African states, one thing is

common among them, the land ownership and hectares under cultivation are relatively small with low capital investments compared to large scale commercial farmers within Africa. The authors contend that African farmers remain smallholders due to centuries of land dispossessed by the colonial systems. For this reason, it is argued that many postcolonial African governments have introduced tenure, land redistribution and restitution programmes to assist African farmers that were dispossessed during the colonial era.

In chapter eight Julius Niringiyimana, William Muhumuza & Murindwa Rutanga focus on political-economies of oil discovery in Uganda. They argue that the relationship between oil discovery and increased large scale transnational land grabs is evident. The chapter argues that the profitability and lucrateness that is globally associated with oil wealth attract various interests in exploiting oil opportunities in the oil village communities in Uganda. Each of the key players such as the government of Uganda, oil companies, private wealth individuals, civil society organisations and the host communities struggle in various ways to ensure that their interests are fulfilled. In the process, community livelihoods such as social, economic, human, physical and financial are disrupted, with adverse effects on vulnerable community members. The chapter brings forth several findings. Firstly, customary land tenure relations are undermined and those who hold it have to work towards possessing land titles. Second, in the process of “acquiring” land, those who own land customarily but do not have written documents to prove ownership, could not be compensated. Third, in the compensation and resettlement procedures, the process was selective to specific items and also marred with disagreements, disappointments and delays. Findings also indicate that the dominant land tenure relations in the oil village communities were customary and the powerful transnational groups interested in oil resource opportunities would fraudulently process and “acquire” land titles to access and own African land.

Shadreck Warikandwa’s chapter nine critically interrogates the marginalisation of Africa’s majorities. To surmount the marginalisation of African majorities, Warikandwa argues that there is need to abandon the neo-liberal framework for a more holistic political economic narrative that appreciates the neo-colonial historical realities that have undermined sovereignty and development on the African continent. The author argues that there must be deliberate efforts on the part of African national governments to systematically create and grow an African nationalist bourgeoisie class, which owns and controls the means of production, to direct capital accumulation inwardly for organic agricultural and industrial revolutions to occur. The role of foreign capital must merely be complimentary to, and not central to the development initiatives of the African continent. Barring these circumstances, it is inconceivable that an inclusive growth projectile can emerge from a system

where the means of production are foreign owned, capital surplus is prone to flight in favour of transnational capital, and the nationalist and pan-Africanist project is in a state of arrested development.

In chapter ten Gift Mupambwa & Mzingaye Brilliant Xaba argue that large multinationals offer the demand side of looting, while some African elites offer the supply side. These two groups are complicit in stealing and looting African resources at the expense of poor African communities. While western liberals characterise the mining activities in Africa by large corporations and international businesses as “investments”, it is clear that transnational corporations loot and steal more than they “invest” in Africa. While there is, for Africans, some fringe benefits from mining such as employment, local development, increase in revenue through tax and other benefits, it is misleading to characterise transnational corporations’ mining activities in Africa as “investment”. The authors argue that in spite of the massive amount of profits that the multinational corporations make, they often fail to fulfil their promises towards local communities and that most communities who have been evicted to pave way for mining are worse-off than before. African elites and politicians help these multinationals to get away with such stealing and looting of resources. The chapter argues that some African leaders have found Chinese “investments” more appealing because Chinese “investors” do not require much scrutiny, accountability and transparency. It argues that local African people who have not benefited from Chinese “investments” have become xenophobic against the Chinese.

In chapter eleven, Moment Tembo provides a critique of Chinese investments. The author argues that in terms of corporate social responsibility (CSR) principles, “investments” in the mining sector should be seen to contribute to community development and environmental management. Among other issues, “investments” such as the extractive sector, predominantly found in the rural areas, can also contribute to local employment and development of local community infrastructure. The chapter contends that the Chinese “investments” are not translating into local development for most host African countries. Authors argue that Chinese “investments” have not contributed to basic infrastructure development, local employment or meaningful contribution to Community Share Ownership Trust in Zimbabwe. In addition, socially, the Chinese are in major breach of labour laws with a massive prevalence of poor labour conditions which among others include assault of workers, work without pay and lack of medical support for the injured employees. Local communities are also affected by Chinese people’s bad environmental management practices: water sources are polluted and there is land degradation. The author argues that Chinese “investments” in Africa are comparable to those in the colonial era wherein Africans were treated as cheap

labour and wherein Africa was regarded as a source of raw materials. In this regard, it is argued that Africa has to decolonise its economy including resources.

Lere Amusan's chapter twelve examines the roles of multinational corporations. Amusan argues that the acclaimed roles of these companies as agents of technology transfer, source of foreign exchange, corporate social responsibility and sources of employment need to be re-examined in Africa and the developing world in general. He notes that Africa is used by the multinational corporations in tests for new drugs. This, for the author, shows that the multinational corporations are only interested in satisfying the interests of their shareholders. The author contends that there is need for institutions such as the African Union to come up with support mechanisms for the development of African pharmaceutical industries. The chapter applauds the African Union for coming up with the Council on Health Research for Development (COHRED) with the aim of Strengthening Pharmaceutical Innovation in Africa. The point that the author makes is that the development of African pharmaceutical industries will prevent the exploitation of Africans by unscrupulous multinational corporations.

In chapter thirteen, Anneli Nghikembua, Hatikanganwi Mapudzi & Nkosinotando Mpofo cogently argue for the incorporation of African indigenous languages in development practices and discourses. While the authors do not argue that indigenous languages are the "saving grace" of development, they contend that the languages are instruments for accelerating advancement and positive transition - they enhance the capacities of those who speak the indigenous languages. The chapter argues that it is high time scholars and practitioners arrest the negative perceptions about indigenous languages. For the trio, it is high time scholars and practitioners revive the subordinated, endangered and dying languages: it is high time they are embraced before they get extinct. Losing one's language implies losing one's heritage, culture and identity. In this regard, it is argued that policy making bodies need to document, develop and preserve indigenous languages.

Howard Chitimira's chapter fourteen observes that Zimbabwe has adopted several economic and financial markets-related "investment" policies and legislation subsequent to 1980. Moreover, numerous "investment" and financial markets-related legislation such as the Securities Act, the Investment Schemes Act, the Asset Management Act, the Investment Authority Act, the Companies Act, the Banking Act, the Economic Zones Act and the Indigenisation Act have been enacted. Chitimira notes that Eurocentric economic, "investment", financial services and financial markets policies, legislation and regulatory measures have not been favourably implemented in Zimbabwe. Furthermore, selective application and inconsistent enforcement of legislation such as the

Securities Act, the Investment Schemes Act, the Asset Management Act, the Investment Authority Act, the Companies Act, the Banking Act, the Economic Zones Act and the Indigenisation Act have also crippled economic growth in Zimbabwe. The chapter argues that these flaws, coupled with political instability and massive corruption on the part of government officials, have negatively impeded the growth of the financial, manufacturing, agricultural and mining sectors in Zimbabwe. In this regard, it is submitted that the government should decolonise Eurocentric “investment”, economic and financial markets policies, legislation and related regulatory measures so as to promote indigenisation of the economy in the country. Chitimira contends that the recent amendments to the Zimbabwean Indigenisation Act should be carefully utilised to empower all Zimbabweans without necessarily adopting Eurocentric enforcement approaches that could enable foreign “investors” to arbitrarily loot profits, resources and minerals to their countries.

In chapter fifteen Talkmore Chidede argues that the African continent has for many years attracted massive Foreign Direct Investment (FDI) projects and developed vast “investment” regimes – something which was considered a menu for advancing “investment”-led development – yet the continent has remained underdeveloped and heavily impoverished. Chidede contends that little or nothing can be shown from the welfare of general African citizens to the effect that FDI has contributed to growth and development. It is argued that this scenario has raised questions among local African communities as to the relevance of FDI in Africa’s development. The chapter argues for critical engagement with the supposed utility of FDI for Africa’s development. Chidede further argues that “investment” regimes ought to be revisited to ensure that they are an essential part to the achievement of Africa’s long-term development, eradicate poverty and underpin sustainable growth and development across the continent. The key issue, however, is the formulation and implementation of workable “investment” regimes or strategies based on the African continent’s unique strengths, rather than merely domestication of old (Eurocentric) “investment” strategies which have already failed to enhance Africa’s development.

Ndatega Victoria Asheela’s chapter sixteen highlights the plight of credit consumers in the Namibian consumer credit market with reference to the *Mukapuli* case. She argues that the Namibian consumer credit legislative framework is based on an assumption that the credit consumer is sovereign and therefore does not encompass adequate debt prevention measures which operate to protect consumers from irresponsible credit granting and the risks of over-indebtedness. It is submitted that the Namibian consumer credit legislative framework is not equal to the task of combating over-indebtedness of consumers. The Supreme Court judgment in the *Mukapuli* case confirms that

consumers falling victim to irresponsible credit granting and predatory lending are perceived to have made their choice and should therefore pay the price. In principle, this judgment is fundamentally correct because courts do not strictly make laws but apply the law as it is. However, in the interpretation of the applicable laws, courts may develop judicial precedent that is binding on the lower courts. Ndatega argues further that it is common cause that the Namibian Supreme Court missed an opportunity to develop consumer credit laws in Namibia by creating precedent for the lower courts which consider the socio-economic transformation of the less affluent members of society. Thus, the author argues that the assumed sovereignty of consumers ignores the realities of the credit markets as it does not reflect the actual bargaining powers of the parties to credit contracts. It is argued that to have a body of consumer credit laws with no responsible lending measures in place indicates that the consumer bears the utmost responsibility in determining whether or not the credit is responsible and affordable for him. Further, credit providers are supposed to explain to consumers the specific features, risks and costs of the credit and ensure that the consumer understands the information provided before entering into a credit agreement. In conclusion, it is submitted that there is a need for consumer credit legislative reform by embracing the responsible lending responses in order to protect consumers from irresponsible credit lending.

In chapter seventeen, Tapiwa V. Warikandwa argues that whilst most Southern African countries have ratified the key International Labour Organisation core labour standards Conventions and have labour legislations that capture the objectives and essence of those conventions, workers continue to suffer in trade-related matters. Most Southern African Development Community countries are reluctant to enforce the labour standards in favour of quick economic gains without paying much attention to the future as proposed by the 2012 Economic Report for Africa. Warikandwa argues that it is high time that the rights of workers in trade related practices are protected in Africa. Workers must now be seen to benefit from the proceeds of their labour. An impoverished work force is detrimental to Africa's developmental aspirations. The author further contends that African countries must adopt robust strategies to eliminate the exploitation of workers by foreign "investors" in trade related matters.

Tapiwa V. Warikandwa & Ndatega V. Asheela's chapter eighteen examines the policies and legislation towards the empowerment of Africans. They argue that previously disadvantaged and still disadvantaged persons must be afforded an enlarged room to participate in the economic mainstream of their country. The chapter contends that adopting an inclusive regulatory approach to economic growth is an ideal mechanism to pursuing the economic empowerment of previously disadvantaged persons even though the reprisals

from the west may be harsh. Sanctions and “investment” withdrawals were experienced in Zimbabwe. In South Africa, there has been a steady decline of “investors” in response to the implementation of indigenisation policies and laws. The duo contend that whilst its net impact on “investment” security is exceedingly negative, indigenisation remains important to Namibia and the rest of Africa. The experiences of South Africa and Zimbabwe in which there has been a detailed capital flight have been highlighted. At the centre of the economic regression in Zimbabwe and South Africa has been the withdrawal of capital “investments” owing to the supposed threats imposed on “investments” by the aggressive indigenisation policies and laws which have been pursued by the aforementioned countries. African countries must decolonise and control their own economies in order to realise tangible economic growth, sustainable development and human capital investment.

In chapter nineteen, Tapiwa V. Warikandwa argues that a social clause is likely to work in the best interests of Southern African Development Community countries if they were to fully implement it. However, it is appropriate to question whether SADC countries, and the rest of the African countries, are ever going to recognise the significance of a social clause, let alone implement it. This question is made all the more important when one considers that the SADC Social Charter’s effects are hardly being noticed with working conditions in the region deteriorating. The Tripartite Free Trade Area for Africa includes member states of the Common Market for Eastern and Southern Africa (COMESA), the partner states of the East African Community (EAC) and the member states of the Southern African Development Community (SADC) hardly showing any sign of sensitivity to the idea of a social clause. The chapter contends that there is need to challenge the dominant mechanism of doing business on the African continent at the expense of the workers and to the benefit of foreign companies. A social clause is imperative in African trade agreements.

Sipho Nkosi’s chapter twenty observes that since the arrival of white people in Africa, Africans have had to adjust to and grapple with the concept of “investment” in the context of banking. They had to understand that African commerce has been supplanted by Western ways of “investment” and trading. The Eurocentric banks themselves have had to deal with financial crimes such as fraud, corruption and money laundering which continue to present systemic and reputational risks to them. It is for that reason that they have been compelled to adhere to internationally accepted prudential requirements that are primarily intended to protect both national and global economic and financial interests. This has included a dedicated focus on terrorism and related activities in order to ensure that the respective banking systems are not used for nefarious or terroristic activities. Nkosi argues that the South African government and the

banking and financial industry have been trying to strike a delicate balance between complying with prudential requirements thereby ensuring their integrity on the one hand, and infusing into it the fundamental constitutional values of Ubuntu viz sympathy, empathy, social cohesion and contractual justice.

In chapter twenty one, Tapiwa V. Warikandwa, Artwell Nhemachena, Nkosinethando Mpofu & Howard Chitimira focus on the right to fair labour practices which is a crucial legal mechanism aimed at robustly addressing colonial injustices in the South African labour market. They argue that contemporary evidence suggests that there has been a very slow process of closing the inequality gap due to labour market injustices which are prevalent in South Africa and are largely driven by multinational corporations. There is therefore need to decolonise the South African labour market to ensure the equitable redress as well as individual and collective restoration of the human dignity and resources of the dispossessed African indigenes. For the authors, the right to fair labour practices is central to the decolonisation agenda. Workers must be protected from exploitation and be given a just share of the South African economy in pursuit of distributive justice. Thus, they argue that the era of an inegalitarian political economy in which multinational corporations continue to benefit at the expense of African workers must now come to an end. The authors contend that this approach should resonate with the central imperative of the Bill of Rights and the transformation and/or decolonisation agenda to protect labour rights and the marginalised in the South African labour market. The approach must further extend the application of the right to fair labour practices to collective bargaining as was the case in the 1956 Labour Relations Act. The effect of this is an interpretation of the right to fair labour practices that, while it takes into consideration the interests of both workers and employers, does not hold those interests to be strict. However where rights are involved, they should not be regarded as if they are mere interests. In that sense, the right to fair labour practices must not be left vague and broad to the extent that litigants are unaware of the ambit of the right.

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Anticipating African Economic Futures – Or Is It Time to Look in the Rear View Mirrors? Land Restitution, Unemployment and the Figure of the Posthuman

Artwell Nhemachena

New initiatives are using technology to connect, support and take action regarding working conditions in the collaborative economy, but still a large proportion of young workers earn about 20% less than the generation before them, despite attending college at much higher rates. At the same time global unemployment increased from 170 million in 2007 to nearly 202 million in 2012, of which about 75 million are young women and men. New and atypical employment is at high risk of being informal (Pivetta et al 2018: 1).

Precarious work is often a theme in the debates on the future of work and the role of policymakers in preparing labour market to meet the challenges of globalization and advances in technology (Nugent, April 2017: 6).

For settlers to live on and profit from land, they must eliminate indigenous peoples, and extinguish their historical, epistemological, philosophical, moral and political claims to land...Settlers must also import chattel slaves, who must be kept landless, and who also become property, to be used, abused, and managed (Tuck et al, 2013: 74).

Colonial and American settlers have embraced and articulated a variety of belief to justify their dispossession of, and violence towards, the indigenous inhabitants of the continent. Indians were labelled as savages and as heathens who had no standing in the human family and thus were excluded from rights affirmed by Enlightenment ideals and settler notions of freedom, democracy, and sovereignty (Steinman, 2016).

Introduction

For a long time, Africans have erroneously been associated principally with the traditional and the implied backward-lookingness while Euro-Americans have associated themselves with the present and the future-lookingness. While Africans have had the tags of traditional, stasis, paralysis and savagery associated with them, Euro-Americans have associated themselves with modernity, progressiveness, development, civilisation and its associated innovativeness and

futurism. Thus, even as they act/ed in neo-colonial ways that were/are savage and backward, Euro-Americans have ironically claimed monopoly over civility, developmentalism, progress and modernity. When Euro-American economic policies visit structural and systemic violence in the global south, for some hidden reason, they do not consider this as savagery or barbarity. When Euro-Americans declare wars – many of which facilitate transnational corporations' plunder in the world - on peoples of the global south, many of which civilians suffer collateral damage, they are paradoxically still considered to be modern and distinct from the savages and barbarians. Yet when Africans and their anti-imperialist leaders try to repossess their resources that were/are looted and plundered by Euro-American transnational corporations, they are summarily declared to be violent savages and barbarians who reclaim resources when they are too backward and underequipped to utilise them. In other words, the Eurocentric story is never about the savage enslavement and neo-colonial plunder, robbery, theft and deskilling of some Africans all of which would otherwise explain why Africans are where they are instead of where they ought to be in terms of progress and development – had they not been savaged by the neo-colonialists.

Instead of focusing on restitution, restoration and reparations to Africans, scholarly discourses have been surreptitiously directed to questions of economic productivity, efficiency and effectiveness of the descendants of colonailists. The ludicrousness of the underlying assumptions of these discourses is yawning. First, it has to be understood that colonial robbery, theft, plunder, looting and exploitation was never considered by the African victims as interchangeable with productivity, efficiency and effectiveness of the criminal colonisers. In other words, the tragedy is that in the contemporary era neo-colonial criminality is mistaken by some for productivity, efficiency and effectiveness. The erroneous assumption is that a criminal who perpetrates robbery, theft and plunder can be excused on the pretext that he/she is efficiently, productively and effectively using the property that he/she stole. The unfortunate thing is that while Eurocentric scholars and thinkers are quick to indict African leaders for supposed corruption, impunity and criminality in general, they would want to ignore and even hide the criminality including corruption that constitutes the foundations of neo-colonial economies – that are often portrayed as global economies. If neo-colonial, alias global economies, are essentially and inherently criminal and founded on neo-colonial criminality, it then boggles the mind why Eurocentric media, scholars, thinkers and policy makers take pleasure in singularly portraying African leadership as corrupt and economically criminal. In other words, Africa has been a massive international and transnational crime scene (Warikandwa and Nhemachena 2017) since the enslavement and colonial eras and nothing has been done to either redress the crimes or to cleanse the

continent of the global criminals that continue to plunder, loot, rob and steal resources from Africans. In this regard, the crimes that worry Africans are not merely those that are allegedly committed by their postindependence African leaders – Africans are *a fortiori* worried about the neo-colonial criminality that is evidenced in the resilient transnational looting, robbery, plunder and exploitation of citizens of the continent (Nhemachena, Warikandwa and Mpofu 2018; Warikandwa, Nhemachena & Mtapuri 2017).

On the African continent, some of the citizens suffer mental colonisation and cannot imagine their own sovereign and autonomous economic and political futures. It is therefore not surprising that even those Africans that steal, rob and loot from their kith and kin invest the proceeds of corruption in the overseas lands of those that have been the masters and mistresses of transnational and international corruption and economic criminality in Africa since the enslavement and colonial eras. In other words, since the enslavement and colonial eras, some Africans have been zombified and so it is important to remember that zombies steal, rob, loot and plunder on behalf of their masters/mistresses. Consequently, zombies vest proceeds of looting and robbery in the lands and hands of their masters and mistresses. While some scholars (Latour 2005; Hardt and Negri 2000) celebrate globalisation, neo-imperialisation of the world and the attendant connections and networks, it is imperative to note that zombies have no futures of their own, their futures lie with the masters and mistresses to whom they are connected or networked. When Africans cease to invest in their villages, nations, continents, communities and in their families; when they cease to work for their villages and for their families and begin to put more emphasis on working for neo-colonial, alias international/global masters and mistresses – this raises lots of questions about African futures. African villages, families, nations, continents and communities are deemed by Eurocentric scholars/thinkers to be autocratic, authoritarian, undemocratic, patriarchal, traditional and backward. However, paradoxically, the Eurocentric thinkers/scholars are busy glorifying “global villages”, “global communities” and “global families” that are no less authoritarian, undemocratic, patriarchal, traditional and backward. The net effect of demonisation of African villages, communities and families as evil is that this destroys village economies, it destroys community, national and family economies in Africa – people begin to want to do economies without their families, nations, communities and villages in mind. Rooted in centuries-old planetary plunder, looting, robbery and exploitation, the global village and global community deprive Africans of their own heritages and futures. The argument here is that Eurocentric thinkers/scholar urge Africans to invest outside the African families, villages and communities – rather Africans are urged to invest in the international, in the global villages and global communities in the interest of the masters and

mistresses who are the chiefs, headmen/women and village heads in the global villages and communities. It is therefore not surprising that even those that embezzle funds from their fellow Africans invest the proceeds in Europe or in America or anywhere else overseas – the investments are not done in the families, villages and communities in Africa. The point here is that it is surprising that some Africans embezzle funds from their kith and kin in order to invest the money in Euro-America where paradoxically the Africans are not even acknowledged as investors worth luring. The paradox is one where some African leaders are busy competing to lure Euro-American “investors” to the continent while at the same time some African leaders are busy embezzling funds from the continent and investing them in Euro-America.

In the light of the foregoing, it is important to remember that during the colonial era, some Africans fought on the side of colonialists and the effect of this was to invest the future of Africa in the hands of the colonialists. The colonialists forced some Africans to loot cows and other resources, from fellow Africans, that were then handed over to the colonialist – the loot committee of the British South Africa Company used Africans as their agents in the looting – Africans were used to loot from their kith and kin. In other words, the present and future configurations of corruption and criminality in Africa are rooted in the practices of the enslavement and colonial eras. Similarly, when some Africans repossess their land, minerals and other resources from descendants of colonialists, other Africans fight to return the land, minerals and resources back to descendants of colonialists. This spirit of zombiehood is increasingly gripping some Africans in a context where some scholars are popularising zombie economics (Quiggin 2012; Comaroff and Comaroff 2001). I would want to argue here that, in so far as zombie economics involve the dead anachronistically appearing out of time, there are multiple dimensions to zombiehood. Zombies include the Africans who continue to think, anachronistically that postindependence economies should continue to be owned and controlled by neo-imperialists; zombies also include the anachronistic neo-imperial ideas and theories that continue to haunt African scholars and economies; zombies include neo-imperial entities that anachronistically continue to haunt Africa – sucking the blood of Africans, exploiting Africans, looting African resources. Zombies also include Africans who are turned by the neo-imperial economic systems into lifeless workers; the zombies include the anachronistic humanoid robots that are deployed to work like slaves in the economies of the emergent posthumanistic world. In other words, a zombie appears in a temporal space that does not belong to it, zombies are made to appear in temporal spaces that belong to others. The zombies lack autonomous and sovereign vitality. Zombies have got life bestowed on them but the life is not autonomous or sovereign – it belongs to someone else. The contemporary Eurocentric deconstruction of

African economic and political sovereignty is meant to generate zombies – without autonomy and sovereignty - out of Africans.

Neo-empire is about confounding space in the sense that territorial spaces belonging to others are colonised by the neo-imperial forces. Neo-empire is also about confounding life in the sense that the autonomy and sovereignty which precolonial Africans had has been destabilised and stolen. Neo-empire is about confounding time in the sense that African temporal spaces have been invaded, scrambled, and African futures and history have been stolen. Africans, who were autonomous and sovereign, were portrayed as backward and behind Europe. In other words, since the colonial era, Africans have been depicted as backward, lacking innovation, as rich in traditions but very poor in faculties of anticipation, imagination and foresight. Part of the colonisation of time was the theft of African futures. Thus, this chapter argues that the colonisation of time did not only involve the impositions of Western concepts and rituals of time (Nanni 2012), but the colonisation of time also included the theft of African capacities to imagine autonomous and sovereign futures. Put in other words, colonialism and neo-imperialism were not merely about the creation and imposition of time and the creation of space but they were about the obliterating, destruction and stealing of indigenous Africans' time. The neo-colonial theft of African material resources is and was contingent on the theft of African time. Africans were denied history, their history was neo-colonially distorted and they were denied autonomous political and economic futures – all they got was short durations and they were forced to live for the moments in the temporal fragments or short durations (Nhemachena 2016). Thus, Kinsey (2013) observes that:

When “Aboriginal time” was acknowledged at all, it tended to be denigrated as dependent upon seemingly irregular environmental rhythms and incapable of transcending nature, the measure of civilization in European thought into this imagined vacuum of time, settlers, missionaries and bureaucrats brought the trappings of “civilized” European temporal identity: the railway station, the mission bell, the Gregorian calendar...

The neo-imperial motivation to steal African time is evident in neo-imperial and Eurocentric claims that enslavement and colonisation of Africans happened a long time ago and therefore Africans are not entitled to claim reparations, restitution and restoration of what was stolen or looted from them. Similarly the neo-imperial motivation to steal African time is evident in the Eurocentric laws about the prescription of neo-colonial offences even as the descendants of the colonialist continue to enjoy the colonial heritages issuing from the theft of what belonged to Africans. The problem here is in proclaiming the prescription of the neo-colonial crimes of theft, robbery and exploitation of Africans while

paradoxically keeping the neo-colonial heritages issuing from the supposedly prescribed offences. If heritages are as much about time, including pastness, as are neo-colonial crimes then it boggles the mind why the neo-colonial crimes are prescribed while the neo-colonial heritages are retained – the question is why not prescribe and proscribe both neo-colonial heritages and neo-colonial crimes or why not leave both the heritages and the crimes open?

By imagining colonised African spaces as *terra sine tempore* or land without time (Kinsey 2013), colonialists did not only deny African time regimes but they stole African temporalities particularly the future. By granting Africans traditions [albeit without history] colonialists did not only deny African time but they also stole African temporalities. The colonialists did not create time in Africa but they stole time in Africa - they cannibalised African temporalities (Nhemachena, Warikandwa & Mpofu 2018). The argument here is that to characterise colonialism in terms of creativity and innovation, as is done by some Eurocentric scholars is to err. It is to ignore not only the destruction but also the theft of African temporalities. The point here is that characterising neo-colonial and neo-imperial businesses as successful, as thriving, as productive, as innovative and as competitive ignores the fundamental aspect of such businesses – it ignores the fact that neo-colonial and neo-imperial businesses are founded on theft, robbery, looting and exploitation. Because neo-colonial and neo-imperial economies are based on criminality, neo-empire would not want its criminal past to be exposed. Similarly, because neo-empire would want to continue to monopolise the future, it would not want Africans to assert autonomous and sovereign futures. In this regard, Africans are denied the pastness of owning and controlling their resources while they are at the same time denied the futureness of owning and controlling their resources. They are denied the pastness of economic autonomy and sovereignty while at the same time they are denied the futureness of economic and political autonomy and sovereignty.

In the light of the above, I argue here that African politics and economies are gridlocked, African temporality is as gridlocked as is African humanity. For these reason, when Africans seek to repossess their resources, they are accused by Eurocentrists of violating human rights even though human rights are in fact contingent on human ownership of resources. When the Africans reclaim their resources, they are accused of violating democracy and good governance even though democracy and good governance are in fact contingent on owning and controlling resources (Nhemachena 2016; Nhemachena, Warikandwa & Amoo 2018). Africans who seek to repossess their resources are demonised as hell-bent on violating the rule of law even though the law should in fact be supportive of restitution, restoration and reparation of Africans. In other words, Eurocentric discourses are violent even though they are couched in terms of

human rights, democracy, good governance and the rule of law. The Eurocentric discourses violate African exigencies and imperatives of restitution, restoration and reparations. There is violence that is hidden in the Eurocentric discourses in so far as they are designed to fortress the neo-colonial and neo-imperial status quo. Thus, while Africans are dissuaded from reclaiming their land and other resources on the pretext that such reclamations are disruptive of the economy, paradoxically, Euro-Americans retain the prerogatives to stir African economies including in ways that disrupt the lives of Africans. Instead of condemning the disruptive Euro-American neo-imperial meddling in African economies, some scholar have simply urged Africans and their governments to adapt to the disruptions, including the emergent disruptive gig economy in which short term contracts or freelance work – as opposed to permanent jobs – predominate (Pivetta *et al* 2018). So, it has been argued that governments, individuals and corporations need to think proactively and adapt to the takeover of jobs by emergent humanoid robots (World Economic Forum 2016). Surprisingly the Eurocentric scholars who encourage Africans and their governments to adapt to global emergent technological disruptions would not similarly exhort Africans to adapt to disruptions emanating from land restitution and restoration programmes inspired by pan Africanism.

Writing about the disruptive changes due to the employment of emergent humanoid robots and Artificial Intelligence, the World Economic Forum (2016: 3 - 26) notes thus:

Disruptive changes to business models will have a profound impact on the employment landscape over the coming years. Many of the major drivers of transformation currently affecting global industries are expected to have significant impact on jobs, ranging from significant job creation to job displacement, and from heightened labour productivity to widening skills gaps... In such a rapidly evolving employment landscape, the ability to anticipate and prepare for future skills requirements, job content and the aggregate effect on employment is increasingly critical for business, governments and individuals in order to fully seize the opportunities presented by these trends – and to mitigate undesirable outcomes... Without urgent and targeted action today to manage the near-term transition and build a workforce with future-proof skills, governments will have to cope with ever-growing unemployment and inequality...According to these calculations, current trends could lead to a net-employment impact of more than 5.1 million jobs lost to disruptive labour market changes over the period 2015-2020, with a total loss of 7.1 million jobs – two thirds of which are concentrated in the office and administrative job family...At the same time, workers in skilled roles, particularly in the office and administrative and manufacturing and production job families, may find themselves caught up in a vicious cycle where low skills stability

means they could face redundancy without significant re-and upskilling even while disruptive change may erode employers' incentives and the business case for investing in such reskilling. Not anticipating or addressing such issues in a timely manner over the coming years may come at an enormous economic and social cost for businesses, individuals and economies and societies as a whole.

What is surprising in the foregoing is that governments, individuals and corporations are urged to think and act proactively in order to adapt to the disruptions caused by the so-called Fourth Industrial Revolution. However, Africans are never urged particularly at a global level to think proactively and adapt to disruption that ensue when they repossess their resources, such as happened recently in Zimbabwe. In fact Africans and their governments are urged to desist from repossessing their resources lest that causes disruption of the economies. In other words, I see hypocrisy in encouraging Africans to adapt to disruptions emanating from Euro-American meddling in Africa but the same Africans and their governments are urged to be impatient and not to tolerate disruptions that ensue from repossession of African resources. Enslavement and colonial eras were disruptive in Africa but Euro-America went ahead with them because the disruptions were beneficial to neo-empire. Similarly, disruptions originating from the International Monetary Fund and World Bank neoliberal Structural Adjustment Programmes were tolerated because these disruptions were beneficial to neo-empire. However, neo-empire would urge Africans and the entire world not to be patient with disruptions emanating from African attempts to reclaim and repossess their resources which are still in the hands of descendants of colonailists. In this respect, the Euro-American world is intolerant and urges Africans not to be tolerant to disruptions emanating from the Mugabe government-led repossession of land. In fact the sanctions that were imposed on the Mugabe government underscored the impatience of the Euro-American world with anything spearheaded by Africans. The problem in Zimbabwe was not necessarily about disruptions, chaos, anarchy, human rights violation, violations of democracy and good governance or violations of the rule of law. Even Euro-American meddling in Africa produce disruptions, chaos, anarchy, violations of African rights, crises in African governance and challenges in practising democracy. The only difference is that in Zimbabwe, the disruptions were part of the African efforts to repossess resources from descendants of colonialists. If the disruptions were in favour of neo-empire, the neo-imperial forces would have tolerated them. To appreciate the disruptions, including unemployment, originating from the emergent Fourth Industrial Revolution including the employment of humanoid robots, it is necessary to examine the implications of the posthumanistic society, which is anticipated to be dominated by humanoid robots.

Vanishing Pasts and Stolen Futures: Anticipating African Economic Futurity

While some thinkers argue that jobs will not entirely disappear due to automation with humanoid robots, (The Guardian 26 June 2017), others argue that automation, robotics and AI are dramatically changing the nature and number of jobs available – in this regard, technology is understood to bring about social unrest and political upheaval. Thus, automation is understood to displace human workers in routine manual jobs, on farms and ports, and in factories – but newer forms of automation, driven by machine-learning technologies, are now beginning to encroach on more highly skilled ‘cognitive’ and ‘non-routine’ occupations, such as accounting, medicine and the law (Healy *et al* 2017). Driverless cars and drones are emerging, job insecurities are also becoming more rampant worldwide and threatening the future of employment, work is becoming less certain and often a less remunerative contributor to material security (The Guardian 9 October 2016). Artificial intelligence technology is being deployed at ever-increasing speed and autonomous weapons, drones, smart machines, self-driving cars, robotic soldiers, robotic teachers, robotic travel agents, robotic interpreters, robotic transportation, robotic logistics operators, robotic administrators, robotic lawyers and robotic police officers are being designed (Mail & Guardian 11 April 2018; The Washington Post 17 February 2016). All these developments have generated debates on the future of work wherein some foresee abundance of leisure, widespread unemployment and deepening social divisions (Healy *et al* 2017; Independent 13 February 2016). Others foresee a lot of precarity of workers, worklessness, uncertainty, and unpredictability of future work opportunities, chaotic and insecure lives (International Labour Organisation 2011; Kalleberg 2009).

Thus, it is noted that robots will create workplace revolutions unlike any seen since the last industrial age, and the robot and intelligent machines will result in more than half the population being unemployed within 30 years (Independent 13 February 2016). In this respect, some fifteen million UK jobs are at risk of being taken over by robots in the coming decades; about 47 percent of total US employment is at risk and the United Nations has warned that robots could destabilise the world (Independent 12 Nov 2015; Frey *et al* 2013; The Guardian 27 September 2017). As far as developing countries are concerned, the World Economic Forum conservatively predicted that robotic automation would result in the net loss of more than 5 million jobs across 15 developing nations by 2020. Similarly, the International Labour Organisation states that 137 million [approximately 56 percent] workers across Cambodia, Indonesia, Thailand and Vietnam are at risk of replacement by robots (The Guardian 11

January 2017; Inter Press Service 19 February 2018; The Telegraph 13 February 2016). Employers are increasingly preferring robots because they do not demand pay rises, they can work around the clock and they have more precision (Quresh *et al* 2014; Prodham 21 June 2016). Lamenting the fact that politicians often misinform the public that jobs will increase in the future, Inter Press Service (19 February 2018) notes that:

Previous industrial revolutions had liberated humankind from animal power, made mass production possible and brought digital capabilities to billions of people. This Fourth Industrial Revolution is, however, fundamentally different. It is characterised by a range of new technologies that are fusing the physical, digital and biological worlds, affecting all disciplines, economies and industries, and even challenging ideas about what it means to be human... The first consideration is that Trump and all the other politicians who want to restore a past glorious future totally ignore this debate... Calling for restoring jobs in mines and fossil fuels, for example, fails to recognise that technological developments have already led to the loss of many jobs, and will continue to do so. So, the rally of disgruntled people, as was the case in Britain with Brexit, is a consequence of the poverty of the political debates, where traditional political parties... instead of explaining clearly the world in which we now are, and the one in which we are heading...

Although there are arguments to the effect that new technology wave powered by artificial intelligence and robots will not lead to above average unemployment (Information Technology and Innovation Foundation 25 January 2018), other scholars note that Luddites and horses permanently lost their jobs to machines during early industrial England (Walker 2014). While some scholars celebrate the emergent technological singularity and virtual immortality resulting from the uploading of human minds onto technological substrates (Kuhn 2015), other thinkers decry the emergent jobless futures arising from Artificial Intelligence including humanoid robots (Nubler 2016). Thus, already companies like Nedbank are employing humanoid robots and will in the near future replace 3000 human employees, McDonalds has also announced that it will be replacing 2500 human cashiers with digital kiosks across America (News24 5 June 2018; Sowetan 20 March 2018; Fin24 4 March 2018). Furthermore, technological singularity – which is a technique that could be used in the future to convert someone's mind into digital data and 'upload' it into an immensely powerful computer (Mail Online 6 October 2017) – would not only allow for immortality but also for the enslavement of human minds that get trapped in the technological substrates.

Although the industrial robots and the Internet of Things are argued to constitute smart industries populated by smart technologies or digital labour,

including smart sensors and robots (World Economic Forum Jan 2015), it is important to also note the downside of such technologies. These technologies have made life precarious for human beings who are increasingly faced with insecure labour markets, precarious work – with low regulatory protection, low wages, decreasing hours of work and deteriorating working conditions (Campbell *et al* 2016; Kalleberg 2009). For this reason, there are worrying figures of unemployment, of lack of decent jobs, of lack of decent wages, of workers who are on temporary contracts, of lack of security of the future – the result being that workers cannot plan for their future (International Labour Organisation 2011; Nugent April 2017). Seen in the light of contemporary de-industrialisation and the attendant working poverty that has grown in recent years (Lever 1991; Crettaz 2011; Castells 1976; Esping-Andersen 1999), it is not convincing to argue, as some thinkers do, that the industrial revolution was beneficial and that the Luddites were wrong. In fact, while some thinkers argue that Britain developed due to industrial revolution in the eighteenth century (Ronnegard 2015), this chapter argues that Britain, Europe and America developed not necessarily due to industrialisation but owing to colonisation including the dispossession, plunder, theft and exploitation of Africans and their resources. The development of Euro-America was not essentially due to the industrial revolution but it was due to the colonisation of Africans. In this sense, it is simplistic for Africans to think that they can develop without reclaiming ownership and control over their resources. The question is, if Britain developed due to looting, plunder and theft of Africans' resources, then how can Africans develop without reclaiming their resources back?

Although it is often claimed that Africans' repossession of their resources would disrupt industrialisation, it is seldom mentioned that Euro-American industrialisation is itself founded on enslavement and colonisation of Africans. Put in other words, there are erroneous assumptions in Eurocentric discourses that, to industrialise, Africa would need Eurocentric democracy, good governance, recognition of human rights, and recognition of the rule of law, accountability, transparency, liberalisation and free trade protocols. Euro-America has "industrialised" and "developed" precisely because of the enslavement, colonisation and failures to observe the rule of law, human rights, democracy, accountability and good governance. The contemporary pillaging, looting and exploitation of African resources (see for instance Bond 2006; Warikandwa, Nhemachena & Mtapuri 2017) by Euro-America do not speak to the rule of law, good global governance, accountability, democracy or observance of human rights. In fact, while Euro-Americans demonise African leaders for supposedly disruptive reclamations of resources, the same Euro-Americans consider their own destruction, disruptions, plunder, theft and looting as "creative destruction" (Foster *et al* 2001; Caballero 2010). They

consider their own disruptions, destruction, plunder and looting as products and processes of innovation by which new product units replace supposedly outdated ones – creative destruction is held to be an essential feature of capitalism that is understood as premised on periodic restructuring and business cycle (Caballero 2010). In fact, in Eurocentric scholarship, creative destruction is considered essential to “maintain excellence” and remain competitive in the capitalist markets – creative destruction is considered to be crucial for “disruptive innovation” (Foster *et al* 2001; Kivimma *et al* 2016). Thus, it is held that Eurocentric progress creates losses as well as gains (Aghion *et al* 1992) and is therefore supposed to be tolerated, if not celebrated.

In the light of the above and in the context of contemporary arguments that Africanisation, indigenisation of ownership and control of economies would cause disruptions of the economies in Africa, one notices some underlying racist and neo-imperial assumptions in the theses on “creative destruction”. One underlying assumption is that Euro-America engages in creative destruction but Africans only engage in destruction that has nothing creative in it. Although Euro-American sponsored civil society and human rights organisations demonise African repossession of resources on account of supposed destructiveness and disruptiveness, the same organisations do not condemn Euro-American disruption of African lives. It is often argued in Eurocentric scholarship that Euro-American-induced economic booms and slumps are norms of balanced expansion; it is further argued that while Euro-American-induced economic change promotes innovation and growth – it at the same time inevitably generates ‘gales of destruction’ (Schubert 2013). In this regard while Eurocentric scholars celebrate their own destruction including neo-liberal destruction – which they address as creative destruction – of African institutions, they ironically deconstruct (Moore 2012; Marie-Eve 2006; Harvey 2006) and condemn African transformations as simply destructive. It has been argued, in praise of Euro-American-induced disruptions, thus: “It would also behove governments not to interfere with the prosperity-creating potential of this radical kind of capitalism, even if the destructive elements bring down established companies and lead to job losses” (The New York Times 10 June 2000).

Africans are simply urged to be resilient to the vagaries of neo-imperial exploitation, dispossession, plunder and looting (Mosavel *et al* 2013). The upshot of the foregoing is that, due to the risk of being demonised as destructive and disruptive, Africans are not supposed to steer their societies away from neo-imperial machinations. In this regard, African youths are urged, on one hand, to be resilient to the “creative destruction” emanating from Euro-America yet they are urged, on the other hand, to revolt and protest against African-led changes which are hypocritically portrayed in global media as simply destructive and

disruptive. Thus, as far as the creatively destructive technological changes, including the emergent humanoid robots and Artificial Intelligence, are concerned, African youths are hypocritically urged to develop “digital resilience” to face the new challenges of workless lives (Ochieng *et al* 2017). Africans are also urged, in Eurocentric scholarship, to be resilient to the neo-imperial global machinations including the global financial crises, which are in fact Euro-American crises (Anyanwu 2011). The Africans are urged to be resilient even to the point of sacrifice – conceiving their death as the ultimate gift to Euro-American neo-imperialism and the attendant capitalism.

The paradox is that even as some Africans have become docile and quiescent neo-imperial sacrificial victims, they have also become as autophagic as to consume themselves. Instead of fighting against the neo-imperial forces that cannibalise them as collectivities, the Africans fight and cannibalise one another. Instead of fighting the neo-imperial systems that render vulnerability, privation and exploitation on the continent, Africans fight against one another in Afrophobic encounters. Instead of fighting the neo-imperial system that plunders their resources, robs and exploits them as a collectivity, the Africans engage in protests and revolts against their own leaders, parents and elders and some leaders, elders and parents cannibalise their own offspring (Nhemachena, Warikandwa & Mpofu 2018; Nhemachena & Kaundjua 2018). Africans have been turned into auto-cannibalism (autosacrophagy) such that they spend time cannibalising themselves in lieu of battling against neo-imperial plunder and exploitation (Christon 2015). Since the enslavement and colonial eras, Africans have been forced to cannibalise their own kith and kin. While neo-empire celebrates African citizens’ uprisings against their African leaders, it is argued here that the attendant African self-cannibalism is an affliction. Termed autophagia or auto-cannibalism, the affliction is understood in terms of neo-colonially-induced psychosis – self-cannibalism is understood to be a psychiatric illness resulting in [African] self-harm behaviour (Libbon *et al* 2015). The point here is that auto-cannibalism or autophagy is pathological and it is degenerative - it is understood to result from dispossession and starvation and so it is also a survival mechanism (Ulamiek-Kozioł *et al* 2013; Glick *et al* 2010; Lin *et al* 2013). While autophagia or self-cannibalism has been understood in terms of biological or physical consumption of one’s own flesh, autophagia or self-cannibalism is understood here in terms of [African] self-destruction more broadly including destruction or eating up one’s own culture, society, polity, economy, family, community and so on.

As part of a neo-imperial strategy to induce autophagy and auto-cannibalism, Africa has been consistently subjected to neo-colonial starvation, dispossession and exploitation. When the Germans drove the Hereros and Namas in Namibia into the desert to starve (Nhemachena 2016; Warikandwa

and Nhemachena 2017), this can be understood as inducement of autophagy or self-cannibalism among the colonised African peoples. When Euro-America imposes sanctions on African states and citizens, this can be understood as a strategy to induce autophagia so that Africans wear one another away, so that they cannibalistically wear themselves away by fighting one another in the state of starvation (Nhemachena *et al* 2018). Apart from burning African granaries to induce starvation to force Africans to depend on them, colonialists have also historically induced hunger and impoverishment by dispossessing Africans of their land and cattle (Ilife 1990; Nhemachena and Mtapuri 2017). Thus, colonisation coincided with severe and recurrent [induced] droughts and epidemics – there are connections between climate, science and European imperialism since empire concealed its savagery by attributing its own activities to nature: empire sought to naturalise its activities (The Patriot 18 May 2017; Mahony *et al* 2018).

Although some scholars argue that Westerners brought about the separation between nature and culture, and between humans and nonhumans (Nhemachena 2016), I argue here that colonialists conflated themselves with nature and with African [natural] resources – they did not separate themselves from African natural resources since the essence of colonialism was in grabbing and looting African resources. To argue that colonialists separated nature from culture or humans from nonhumans is to ignore the looting that colonialists engaged in – the colonial looters could not have conceivably sought to separate themselves from the African resources which they were looting. Similarly, by engineering droughts and climate changes, colonialists could not be understood as separating humans from nonhumans – in fact climate and weather have been used by some Westerners in military history to bombard opponents with floods and droughts (Nhemachena, Warikandwa and Mtapuri 2017; Keith 2000). In other words, neo-empire celebrates becoming weather, becoming climate and becoming nature and it becomes so in order to hide behind nature as it bombards Africans with disasters including droughts and famines of various kinds.

The upshot of the foregoing is that neo-empire has never relied on linear time that supposedly underlies notions of economic growth as well as notions of development - and it has not humanised time. Neo-empire has confounded natural time and human time – it has confounded natural time for droughts with its own time that is massaged via designer or modified weather and climate. It has confounded the time of God with its own time. Whereas nature has seasonal or diurnal time, neo-empire confounded the fluctuation of nature with the fluctuations of neo-imperial whims. The variability of neo-empire has become the variability of nature. In this respect, the privation that neo-empire visits on Africans is misleadingly portrayed in global media as naturally induced. The

poverty that neo-empire inflicts on Africans is erroneously assumed to be natural and to pre-exist colonisation and enslavement. The destitution that Africans suffer due to neo-imperial dispossession is erroneously assumed in much of the extant writings to be natural or to be naturally induced. Neo-imperially induced droughts and “climate change” are assumed to be natural. The imperial time for colonisation was assumed to be Godly time for civilisation and salvation – in other words empire deliberately conflates and confounds time, it conflates and confounds humanity with nonhumans, nature with culture. In this regard, to anticipate African futures requires African notions of time. It requires Africans to refrain from colonial confoundment of time for enslavement with time for freedom, colonial confoundment of colonial time with time for civilisation and freedom; it also requires Africans to refrain from confoundment of their self-consciousness with the consciousness of neo-empire. In other words, it requires Africans to refrain from confounding their own streams of socio-political and economic consciousness with the streams of neo-imperial consciousness.

The import of the foregoing is that colonialists eclipsed God’s time and implanted their own time in the place of Godly time. In this regard, instead of conceiving God as residing in the future, some Africans have come to conceive the Euro-Americans as residing in Godly futurity. Instead of following futurity as spelt out by the Divine Being, some Africans now follow the West as if it is the new Divine Being. Instead of conceiving innovations and futurity from Divinity, some Africans now conceive innovations and futurity as originating from Euro-America. In other words, Euro-America has conflated itself with the future, it is becoming “God” even as it is increasingly denying the existence of God. Thus, there are some Eurocentric scholars who have denied temporality as coming from higher non-temporal state of eternity (Critchley 27 July 2009). The net effect of all this is that Euro-America has replaced eternal Godly temporality with neo-imperial temporality. In this sense, Africans are often deceived that neo-imperial time is linear, that the neo-imperial time is successive and that they are experiencing a continuous flow of time when in fact they are seeing and experiencing a succession of fixed frames or stills (see for instance Phipps 2016). The point here is that neo-imperial time is fundamentally stolen time. While some scholars argue that in traditional societies, time is cyclical or spiral as it is argued to be repetitive and inclined to reincarnation (Helman 2005), I argue herein that Western time is not necessarily directional – it is essentially stolen time. I argue that Western time is cyclical, repetitive and premised on philosophies of reincarnation in so far as these characteristics assist in the neo-imperial dispossession and exploitation of others. As underscored in scholarly publications about the new scramble for Africa, neo-colonialism and coloniality (Ndlovu-Gatsheni 2013; Southall *et al* 2009; Warikandwa, Nhemachena &

Mtapuri 2017) empire is reincarnating and retooling – empire has not become passé in a linear and nonrepetitive sense. Africans are re-experiencing the tribulations of the enslavement and colonial eras in the context of the new scramble for Africa yet neo-empire presents deceptive figments of nonrepetitiveness and linearity of its neo-imperial time.

With enslavement and colonisation, Africans were deemed by Westerners to be progressing into the civilised future when in fact there was no such linearity and progress. In fact Africans were being dispossessed, enslaved, robbed, and exploited yet empire presented this as linear progress and civilisation. With the granting of African independence, Africans have been portrayed as progressing into the postcolonial future when in fact, there was neither progression nor the march of temporal linearity. The West pretends that it is taking Africans into the future in terms of linear time when in fact it is merely repeating the same age-old plunder, exploitation and dispossession of Africans. In this respect, I argue that the linearity of neo-imperial time is a figment of imagination designed to pacify Africans who are made to believe that they are being conveyed into the future and into novelty when in fact the same old neo-colonial fate is being recycled. The West recycles plunder, dispossession, exploitation, enslavement and colonisation. Coloniality is about the recycling of these old forms of criminality. In this regard, neo-empire preserves and conserves itself by carrying out rituals of renewal even as it professes linearity of its time. Neo-empire preserves and conserves itself by disguising and recycling its ideologies even as it professes linearity and nonrepetitiveness of its time. Given the centuries over which ideologies of progress, civilisation, development and modernisation have been peddled without evidence of actualities of changes or transitions, it should by now be clear to Africans that they have been and are being temporally deceived using neo-imperial still-frames. They are still and not progressing to anywhere in spite of neo-imperially sanctified proclamations of linearity, progress and nonrepetitiveness of time. The problem in all this is that neo-imperial time is not only an ideology but it has assumed, among some Africans, a form of religiosity imbued with neo-imperial sacredness. For this reason, any African efforts to think outside the box of imperial ideology, to seek repossession, restitution, restoration and reparations is considered, as was done in the case of Zimbabwe, to be a threat to the sacredness of neo-imperial relations including the sacredness of imperial ideologies about progress, linearity, and nonrepetitiveness of time. The point here is that some Africans have become religious to and disciples of vacuous neo-imperial ideologies of progress, civilisation, linearity, development and change.

If science is about trial and error as well as innovation and inventions, then neo-empire does not want scientific Africans: what neo-empire desires are

Africans who are religious to the point of considering the neo-imperial politics, economies, laws and other institutions as sacred and inviolable. Religiosity is not merely about attending church services, staying at monasteries and participating in sacraments including Eucharism – religiosity in this sense is *a fortiori* about faith in the sanctity and inviolability of neo-imperial economic, political and legal institutions. For this reason, neo-imperial rituals of renewal, including economic ones, are aimed at maintaining the vitality of its institutions. In a world where the West is keen to monopolise life, it naturally would want to monopolise futurity because to belong to the ideological future is, at the level of logic, to possess vitality while to belong to the past is to be dead, that is, to lack vitality and futurity. Thus, it is not surprising that some scholars erroneously portray Africans as having long pasts, presents and virtually no future (Kanu 2015). Emphasising the existence of life or vitality in futurism, rather than in the past, Phipps (2016) notes that Bergson's creative evolution should be seen as the expression of an enduring life force (*elan vital*) or vital impulse that is continually developing. In this regard, the Westerners who claim to monopolise innovation, growth, development, progress also naturally claim to monopolise creative evolution including the vital life forces in the world, they claim to monopolise the future such that whatever futures Africans will anticipate are not necessarily African futures but neo-imperial futures. Real African futures have been confounded with hyperreal neo-imperial futures. After all, postmodern societies have cancelled out binaries between the real and the hyperreal.

In a world where, in evolutionary and development theories, Africa has been assumed to constitute the past of Euro-America, it is germane to note that pastness, by extension, implies the status of detritus. When Euro-Americans dump their disused goods including used clothing, e-waste, used motor vehicles, used electronic equipment in Africa - wherein the continent has become a rubbish dump - the underlying assumption is that Africa is backward. Africa is regarded by Westerners as a continent suitable for detritus of various kinds, including neo-imperial droppings and garbage. The underlying assumption is also that Africa is not for the future-oriented but for the recycled, for the dead, for zombies and for reused garbage, in metaphorical and real terms. At an economic ideological level, Africa is assumed to be a continent of recyclers: a continent of those that recycle material or physical aspects of the neo-imperial detritus – but the continent is, more fundamentally, also assumed to be one which is full of economists who simply recycle neo-imperial economic theories mined from the neo-imperial theoretical rubbish dumps. Put in other words, the sad thing is that some Africans have ceased to think in terms of innovativeness and inventiveness; they delight in scavenging the neo-imperial rubbish dumps at both material and ideological levels. In other words, economic garbage-pickers exist at an intellectual level wherein, sadly, intellectual or ideological

garbage is blindly recycled on the continent of Africa. What is seldom realised is that there is no future in mining rubbish dumps of whatever kinds. Arguably, what Africa needs is to reclaim its own pastness that was also connected to African futurity. In any case, it is preferable to mine one's own droppings than it is to mine someone else's. Africans need to look to the African past in order to reclaim their futures: they also need to look to the African future in order to reclaim their past. The African past may not all be glorious but the point is that it can at least be mined for compasses on how to become autonomous and sovereign Africans who have ownership and control of their resources.

When Africans seek to reclaim their land, neo-empire uses the colonial scarecrows including colonial myths of absence of development in precolonial Africa – it is quick to inform Africans that they cannot develop on their own. Africans are painted as lacking the necessary creativity and *elan vital*. When Africans seek to reclaim their land and other resources, neo-empire is quick to claim that the Africans are regressive and atavistic. It is as if repossessing resources is naturally and inherently incompatible with African progress and development. When Africans repossess their resources, neo-empire is quick to inform them that doing so is counter to industrialisation – and the erroneous implication of this is that there were no industries in precolonial Africa (Nhemachena and Dhakwa 2017). Everything that Africans do on their own has come to be defined in terms of atavism and regress – the fathers and mothers of progress, of futurity and evolution, development and growth are always assumed to come from elsewhere outside Africa. All that Africa is accorded in this regard is pastness – a pastness that does not have vitality, that is, a pastness that amounts to detritus or droppings. When Africans reclaim their land and other resources, they are portrayed as backward, as undemocratic and abusing human rights even if the reclamation of ownership of African resources humanises the Africans who thereby become dignified by the ownership and control of their resources.

The neo-imperial forestalment of African futures is not only seen in Libya but in the entirety of Africa. Libya which during Muammar Gaddafi's rule had a high level of human development, high literacy rate, broad access to health, free access to education and high income was reduced to civil war. Gaddafi, who wanted to advance the unity of Africa, to build a United States of Africa, to introduce a common currency in Africa and to establish a bank for the African Union (Garcia *et al* 2018); was toppled on the basis of the machinations of neo-imperial powers. This was all because Libyan oil was, during Gaddafi's rule, owned and controlled by Libyans and the United States of America and Britain had very little control over Libyan resources. In post-revolution Libya, Britain, France and the United States of America assumed control over Libyan resources which they used to grow their own economies back in Euro-America (France24

1 September 2011). Gaddafi had been able to give free health, free education, unemployment allowances, interest free loans, start-up allowances - for newly married couples - of up to US\$60 000 and generous living allowances for Libyan students abroad (The Herald 3 September 2014). Because the Libyan state controlled the economy in such a way that it offered futurity to African citizens instead of allowing African resources to guarantee and underwrite the futurity of Britain, USA, France and other Western countries, Euro-America was unhappy with Gaddafi's policies that were portrayed as unfriendly to the neo-imperial market.

What is seldom acknowledged in economic discourses is that market-orientation is in effect Western orientation because it is the Westerners that define, control and own the markets. In this regard, to be market oriented is necessarily to be Western oriented as opposed to being African-oriented. In a similar vein, to "open up to the market" effectively means opening up to Western interests because the markets are owned and controlled by the Westerners. Because the "invisible hand of the market" is in fact the invisible hand of neo-imperial forces (Nhemachena 2017), calls on Gaddafi to ensure the workings of the "invisible hand of the market" entailed the workings of the invisible hand of neo-empire. Calls to introduce free market policies effectively meant freeing the invisible hand of the neo-empire to operate in Africa and Libya in particular. If as Khan *et al* (2013) note, the Libyan economy was performing reasonably well during Gaddafi's rule, it then boggles the mind why Euro-America kept on fighting for the private sector to be given preference over the Libyan state enterprises. The presence of the private sectors and market orientation in Africa does not necessarily imply the betterment of Africans – in fact, the private sector visits privation and exploitation on Africans.

As part of processes to deny Africans their own futures, neo-empire stirs up revolutions against selected African leaders that are seen as enabling African citizens to anticipate and define their own futures. With increasing access to social media and other apparatuses of action at a distance, Africans will increasingly suffer revolutions stirred from outside the continent – revolutions that are in fact meant to deny Africans their future while tying them more tightly to the futures of neo-empire. The fact that Britain, France, America and other western countries, in collaboration with opposition forces in Africa, stirred the revolutions in Libya, Egypt, Tunisia, Iraq and other countries (Hosseini-Zadeh 23 June 2011; France24 1 September 2011; Koenig 2016), clearly shows that African futures are defined from outside. In a post-truth world where social media is used to peddle information even without evidence of veracity, Africa will likely face many more such postmodern protests and revolutions which do not result in restitution, restoration and reparations to Africans. If the Arab Spring revolutions were about restitution and restoration of resources

historically stolen by neo-colonialists, neo-empire would not have supported the revolting Africans. Although the postmodern revolutions are stirred in the name of African civilians and ordinary citizens, it is important to note that they are actually meant to open up the continent of Africa to neo-imperial exploitation and plunder. The postmodern revolutions are not meant to enable Africans to imagine and anticipate their own futures but to tie them tightly in the global neo-imperial horse and rider relationships – some horses may enjoy being ridden by Western masters. The masters and mistresses do not cease proclaiming alluring “smart” horse and rider relationships, smart collaborations or smart partnerships (Nhemachena, Mlambo & Kaundjua 2016; Nhemachena, Warikandwa & Mpofu 2018).

Because of the preponderating horse and rider partnerships/relationships between Africa and Euro-America, there is the danger that contemporary postmodern revolutions that are occurring in Africa are not necessarily African revolutions. They are revolutions and protests by African “horses” on behalf of their Euro-American riders. While Eurocentric scholars are increasingly demonising African liberation movements and African nationalism, there is hypocrisy in that the same scholars, civil society organisations and Eurocentric institutions claim to support the liberation of African youths who are often mobilised through social media. Puzzling is how African youths can be liberated by Euro-American institutions that do not support or even sponsor African restoration/restitution/reparation movements. The question here is about how African youths can be liberated without repossession of their resources from descendants of colonialists. Euro-American proclamations of a kind of democracy that does not entail restitution and restoration risk being vacuous – such a kind of democracy is not worth the paper that it is written on. Similarly, proclamations of human rights which do not translate into restitution/restoration/reparations are not worth the paper on which they are written – such kinds of human rights are not liberating to Africans (see Nhemachena, Warikandwa & Amoo 2018).

There are arguments that the most important question facing land restitution in Africa is how it can contribute to increasing employment, incomes and livelihoods among the population (Cousins 12 Feb 2018). However, I will argue here that the present descendants of colonialists who own and control African land are hardly concerned about the same issues of creating employment, incomes and boosting the livelihoods of Africans. The unfortunate assumption in the arguments is that when colonialists dispossessed and exploited Africans as cheap labour they [aimed to] improved the incomes and livelihoods of the African victims. While other scholars argue that it is important not to disrupt employment by repossessing land, some scholars like Terreblance (2003) cited in Lahiff (n.d.) noted that the new global political

economic order is no longer desirous of African labour but it is premised on systematic exclusion and systematic neglect of Black people [who are being replaced by humanoid robots]. While the capitalist neo-liberal ideology presupposes that the present economic order is efficient, productive, caring, just and fair, I would argue here that colonial economies whether liberal or neo-liberal have never been efficient, rational, responsible, accountable, productive and just to Africans that are still being exploited and dispossessed of their resources. In fact African farm workers in the employ of the descendants of colonialists are severely underpaid, they are in precarious employment, they have poor housing and labour conditions, and they lack the protection of the law (Hall *et al* 2013). There is a sacrificial side to neo-colonial employment that is seldom mentioned in claims that neo-colonial industries provide employment to Africans.

Economic Saviours or Sacrificers? Posthumanist Economies and Mirages of Decolonisation

One of the biggest problems in Africa is that colonisation was deceptively portrayed as civilisation, progress and development – similarly neo-colonisation is erroneously depicted as development, modernisation, progress and growth. So, in spite of glaring underdevelopment in Africa (Rodney 1972; Mhango 2018) descendants of colonialists who happen to be evicted in the ongoing repossession of land in Africa are paradoxically quick to claim compensation for supposedly developing African land on a continent where there is every sign of underdevelopment. It is hypocritical for colonialists and their descendants to claim compensation for supposedly developing the African land that they stole in the first place. There are erroneous underlying assumptions, in the claims for compensation, that colonialists were saviours when in fact they dispossessed, exploited, robbed and sacrificed Africans. For colonialists to claim that they developed African land is to effectively claim that colonisation was good for Africans and that the indigenous people must therefore pay for supposed developments emanating from being colonised. This is more like a rapist who claims that the victim benefited from the rape and therefore she must pay compensation to the rapist. Thus, the Zimbabwean government is being pressurised to compensate descendants of colonialists [to the tune of US\$ 9 billion] who lost out when Africans repossessed their land since the beginning of the year 2000 (Daily News 11 Feb 2018). However, the same descendants of colonialists are refusing to compensate Africans for enslavement, genocide and for colonial dispossession and plunder. In the global media, any African who raises the issues about restoration, restitution and reparations that are due to Africans is summarily demonised even as the same global media and

Eurocentric scholars sympathise with descendants of colonialists who claim compensation for colonising and enslaving Africans. In this regard, the former President of Zimbabwe, Robert Mugabe, has been consistently demonised in the global media and in Eurocentric scholarship, for supporting the Africans' repossession of their land and other resources (Nhemachena 2017).

To conceal their plunder and destruction of precolonial African economies, some Eurocentric scholars depict precolonial Africans as having been hunter-gatherers or as having been peasants. In other words, they ignore the existence of precolonial industries as well as precolonial commercial activities in Africa (see Nhemachena and Dhakwa 2017; Ellert 1984; Schmidt 1992; Oyewumi 1997; Posselt 1935; Chirikure 2010). Due to these erroneous representations of precolonial Africans as having been mere peasants and hunter-gatherers, it would not be surprising to find some Africans believing that industries including commerce originated from colonisers. For this reason, when there are opportunities to seize their economies and exercise economic sovereignty, it would not be surprising that some Africans would rather hand the resources back to descendants of colonialists whom they credit with inventing industries and establishing commerce in Africa. Thinking that colonialists and their descendants are the ones that know how to establish and run industries including commerce, some Africans consider partnerships and joint ventures with colonialists to be inevitable (Daily News 29 October 2017; Researcher 2010; Mail & Guardian 31 July 2009) even if the kinds of partnerships assume the form of horse and rider relationships.

Instead of claiming restitution, restoration and reparations, many African governments including South Africa and Namibia have simply focused on economic inclusiveness. However, inclusiveness is not a remedy for colonial dispossession, robbery and exploitation. In any case, Africans are only being included in the postcolonial economies on the terms of the descendants of colonialists who remain the gatekeepers of national, continental and global economies. For this reason, the Black Economic Empowerment projects are not adequate because they do not address colonial dispossession and exploitation – underlying the Black Economic Empowerment projects are the exigencies of inclusion and not restitution, restoration and compensation. Discourses about inclusion erroneously assume that colonisation was simply about the exclusion of Africans yet colonisation was about robbery, genocide, theft, looting, sacrifice and exploitation of Africans. Similarly, while matters of race underlie Black Economic Empowerment, colonialism was not simplistically about race – it was about robbery, theft, plunder and exploitation of African people. Merely addressing matters of race does not assist in making good the colonial robbery, theft, plunder and exploitation.

While some scholars focus on land reform, I argue herein that when Africans repossess their land, they are not necessarily engaging in land reform but they are repossessing and taking back their land. Land reform is not equivalent to or synonymous with land restitution or repossession and so they cannot be used interchangeably – neither must land reform be accorded more prominence than restitution and repossession of land. Equally, when Africans repossess their resources, they are not simplistically engaging in redistribution of their resources. There is a difference between redistributing resources and repossessing one's resources that were stolen before. Foregrounding the terms land reform, land redistribution, economic empowerment and economic inclusion conceals the criminality that colonialists perpetrated on Africans – if one has had one's resources stolen, one does not seek reform or redistribution or empowerment or inclusion as remedies for the theft (see Warikandwa & Nhemachena 2017). Rather one seeks restitution, restoration and compensation – these terms underscore the criminality of the colonial enterprises that dispossessed, robbed, plundered and exploited Africans. Similarly, Africans who repossess their resources need not be interpreted as merely struggling for equality in the Eurocentric sense. When a criminal has stolen or robbed them, the victims do not claim equality with the criminal but they seek compensation, restitution and restoration. Colonisation was not merely about creating inequalities – it was about theft, robbery and exploitation and therefore to reverse colonisation, it is necessary to retribute, restore and compensate those that were victimised.

Thus, in the summary demonisation of African land restitution and restoration [which are depicted as disruptive to the private sector industries], it is forgotten that the colonial private sector generated privation for Africans. It is also forgotten that the colonial private sector was not about the creation of jobs or employment for Africans but the dispossession and exploitation of the Africans. The colonial private sector was not about the generation of high GDP or GNP for Africans but for their neo-imperial appetites. Colonial private sectors were not about raising the livelihoods of Africans but the generation of profits for neo-empire. It is forgotten that colonialism and apartheid were not about improving the conditions of life for Africans – Africans did not have the problems of unemployment, homelessness, landlessness in the precolonial era before they were dispossessed, robbed and exploited. When Africans claim their land and other resources back, they should not be mistaken as struggling for mere access to land – they are struggling for restitution and restoration of their land and not for mere access to land. In fact, dispossessed, robbed and exploited Africans should not be mistaken for disadvantaged people – they are not simplistically disadvantaged or marginalised but they are *a fortiori* victims of colonial robbery, theft, plunder and exploitation (Nhemachena 2018). To

categorise them as merely disadvantaged, marginalised and underprivileged would be to neutralise and trivialise the immense criminality of the colonialists and their descendants. There is a fundamental distinction between a victim of robbery and a disadvantaged, marginalised or underprivileged person and so it would be inappropriate to refer to a victim of robbery as a disadvantaged/marginalised/underprivileged person. Africans are victims of colonial robbery; they are not merely marginalised/underprivileged/disadvantaged.

Portrayed as marginalised/disadvantaged/underprivileged rather than as victims of colonial theft, robbery, plunder and exploitation, Africans are denied the opportunities to sue for restitution/restoration and compensation. Describing Africans as merely disadvantaged, underprivileged and marginalised serves, at the ideological level to conceal the criminality of the colonialists and their descendants and so it serves to prevent Africans from considering colonisation as criminal for which criminal remedies need to be sought. Instead of seeing clearly the criminality of the colonialists and their descendants, Africans who are depicted as marginalised/underprivileged/marginalised would mistakenly begin to consider the colonialists as generous for recognising them as such. The Africans are then globally ideologically prompted to fight their own governments and states that are conveniently portrayed as the perpetrators of marginalisation, disadvantage, underprivilege and exclusion. In other words, instead of directing their frustration, rage and blows at the neo-imperial edifice that continues to dispossess, rob, steal, plunder and exploit Africans, the Africans are prompted to fight their states that are consistently demonised through neo-imperial media images. In the contemporary neo-imperial sponsored postmodern revolutions – African youths are provided with social media including Facebook and Twitter for postmodern “Twitter Revolutions” and “Facebook Revolutions” against their states and governments (Crofford 2015). Unemployment, which has its origin in the neo-colonial structural creation of labour that involved dispossessing Africans of their land and resources, is now depicted as emanating largely from failure of African governments. Ignoring the neo-colonial origin of unemployment and homelessness, the Eurocentric scholars and thinkers singularly blame African governments that are depicted as failed, authoritarian, corrupt, weak and inefficient (Crofford 2015; Schwarts 28 April 2011; Anderson 2013). The ongoing looting and exploitation of African resources by transnational corporations, some of which evade the payment of taxes to African governments (Nhemachena & Dhakwa 2017), is ignored in the neo-imperial matrix of inciting postmodern revolutions and protests in Africa.

African youths have fought postmodern revolutions and protests that have failed to bring them material economic relief because they often do not realise

that neo-empire incites the revolutions so that it opens up Africa more to Western exploitation. Even after the revolutions and protests, Africans continue to live under distressing conditions with neither ownership nor control over their resources. The point here is that postmodern revolutions do not necessarily benefit African youths but they benefit Euro-America that seeks to topple African states and governments, particularly those that resist neo-imperialism, so as to enhance the dominance of transnational corporations and institutions on the continent. Thus, Saika (20 August 2016) noted that five years after the Arab Spring, the situation in many countries did not improve and the youths are in need of another revolution to ensure they have a definite future. African youths are being accorded vacuous neo-liberal freedoms of expression and association in post-Arab Spring states but the economy remains in the hands of Euro-American corporations (Gabsi 2017). The issue here is that Euro-American institutions, corporations and organisations support coloured revolutions in nations with strategic natural resources including oil, gas, military bases and geopolitical interests; the postmodern revolutions take place in countries with socialist leanings and with anti-imperialist governments. Euro-American institutions and agencies that raise tensions and questions of potential electoral fraud promote the revolutions. The agencies fund, train and advise youth movements to encourage change that is meant to debilitate and disorganise state pillars, neutralise security forces, create senses of chaos and instability (Global Research 5 March 2014). African states that are detested by Euro-America have got political and economic shock therapy administered on them so as to effect regime change: African youths and NGOs are employed by Euro-American institutions and agencies as vectors for neo-imperial regime change on the continent (Sussman *et al* 2008; The New York Times 14 April 2011; Global Policy Forum 17 October 2007).

While African youths are being urged to revolt against their states and governments that are alleged to be creating unemployment, poverty and misery, Euro-American institutions, states and corporations are ironically busy promoting the emergence of post-industrial societies dominated by leisure ethics (Newman 2006). In the envisaged and emergent post-industrial societies, the automation of work will progressively liquidate labour and there will be less and less work, there will be less and less of working classes and there will be the emergence of leisure society (Dyer-Witheford 1999). Although Africans are discouraged, by the Euro-American institutions and agencies, from seeking restitution and restoration of their resources on the pretext that doing so would compromise employment, Africans are nevertheless facing the global emergence of post-industrial, post-work societies and the rising precarious work in the entire world. Precarious employment entails insecure jobs, vulnerability, part-timers, temporary workers, outsourced arrangements, and erratic incomes:

for precarious workers everything is fleeting with the future hanging over them – they are therefore sacrificed in the flexible labour markets (The Guardian 1 June 2011).

If, as is the case, working for someone else for subsistence wages is a key feature of slave and prison labour (Global Research 26 March 2018; McManus 2016; Sokoloff 2007), it follows that discouraging Africans from taking over their resources and from working for themselves in their own [agricultural] industries amounts to considering them as slave and prison labour. I argue here that in much the same way that prison labourers are not their own masters and mistresses, African labourers are not their own masters and mistresses because they work for Euro-American and Asian corporations. Africans were forced to labour in neo-colonial industries, farms, mines and factories. Equally, the current wave involving the creation of postindustrial and postwork societies signifies the opposite of structural creation of labour – it underscores what I would call the **structural creation of forced leisure**. If colonialism involved the structural creation of forced labour, the contemporary global dispensation is hell-bent on structurally creating forced leisure. Much as colonialism was about the creation of precarity among Africans and rendering them vulnerable, the contemporary era is bent on unleashing precarity on the landless and workless Africans.

In the light of the foregoing, it should be noted that insecurity, for Africans, is being created through automation and the deployment of humanoid robots that are increasingly taking over jobs from human beings. In this regard, it is predicted that over 5 million jobs will be lost to humanoid robots in the 2020s (Novitske 12 February 2018). Paradoxically, Euro-American institutions and agencies put Africans in panic mode when employment shrinks due to land restitution and restoration. However when jobs are taken over by humanoid robots and Artificial Intelligence, the same institutions and agencies urge Africans and other peoples to remain calm – rather Africans and their governments are encouraged to adapt to the loss of employment caused by humanoid robots. Thus, Novitske (12 February 2018) observes that African governments, investors and NGOs have been urged to prepare for and adapt to the hardships including loss of jobs due to the emergent fourth industrial revolution. Whereas Africans are urged to get prepared for and to adapt to the hardships of the emergent fourth industrial revolution, the same Africans are encouraged to resist African inspired land restitution/restoration programmes that are alleged to produce unemployment and joblessness. Instead of training African students to reclaim their resources, which were stolen during the colonial era, African universities focus on ensuring that students adapt to the needs of the neo-imperial job market. African universities are sadly being used to train students for the fourth industrial revolution (Novitske 12 Feb 2018) but

they are not training students to fight for restitution, restoration and compensation for colonial dispossession, plunder, robbery and exploitation. Instead of African youths being empowered through restitution of land and other resources, it is simplistically assumed that African youths can be empowered merely through supposed involvement in decision-making, mentorship programs, and entrepreneurial support, through supposedly improved education, skills development and employment facilitation.

While Africans are dissuaded from paying compensation to their own liberation war heroes, the same Africans are forced to pay compensation to neo-colonial heroes who claim to be the champions of civilisation, development, modernisation and progress. Thus, the Eurocentric media and scholars dissuaded Zimbabweans from compensating their liberation war heroes – “lest the economy would crumble”. Ironically, Africans were also urged to hero-worship Euro-Americans that claim to be the champions of civilisation, development, modernisation and progress. In fact, even as descendants of colonialists claimed compensation for improving or developing African land, the same neo-colonialists dissuaded Africans from compensating their liberation war heroes. The underlying assumption in the colonialist claims for compensation for supposedly developing and improving African land is heroism – there is the assumption that the colonialists and their descendants are heroes in Africa even as they also dissuade Africans from recognising their own heroes of African liberation. When France forced its former West African colonies, including Togo, Central African Republic, Benin and Mali, to pay compensation for being colonised (Pambazuka 16 May 2018; Nhemachena and Warikandwa 2017), the assumption is that the French are heroes in Africa – the mischievous implication is that colonisation of Africa was a heroic act that supposedly brought improvements, development, modernisation and civilisation. The point here is that while Zimbabwean liberation heroes claimed compensation for partaking in the liberation war that brought independence, the Euro-Americans claim compensation and heroic statuses for supposedly bringing about civilisation, modernisation, development and progress. In both cases, there are claims of heroic statuses but the fundamental question should be which acts are really heroic for Africans and *a fortiori* pan Africanists?

Claiming heroic statuses for colonising Africans is in fact mischievous. It is like a rapist or robber who claims heroic status for committing rape/robbery – for raping/robbing a victim. Paradoxically, this is what is happening as neo-colonialists and neo-imperialists claim heroism on the pretext that they brought development, modernisation, civilisation and progress to Africans – who were in fact victims of neo-imperial robbery, theft, looting and plunder. Thus, African governments and states are dissuaded from compensating liberation war heroes but they are encouraged to compensate neo-colonial states like France that are

erroneously and mischievously deemed to have heroically saved Africans from backwardness, savagery and barbarism. When African governments pay compensation to African liberation war heroes, the Euro-American media is quick to demonise the governments and to quibble that compensating them is not good for the stability of the African economies (VOA 14 Nov 2016; Financial Gazette 1 October 2015; Newsday 22 January 2016; News Vision 26 November 2009; Informante 24 June 2010; Sadomba 2011). Compensating the African liberation war heroes is hypocritically deemed to result in “Black Fridays” – to result in grave consequences for the economies (Financial Gazette 1 October 2015; Mohlamme 1995; Stapleton 2011). Paradoxically Eurocentric ideologies persuade Africans that compensating white farmers, even in a crumbling economy such as the Zimbabwean one, is good for the economy.

The hypocrisy lies in the fact that Euro-America and their networks of NGOs and Civil Society Organisations make a lot of noise about the economic unsustainability of African governments – this happens even as the Euro-Americans burden African governments with unsustainable odious debts inherited from the colonial governments and states. Odious debts, subjugation debts or regime debts are inherited from previous colonial regimes which did not benefit or were even used to repress the African people (Howse 2007). In other words, upon gaining independence, African states and governments were forced to pay immoral and illegal colonial debts inherited from odious colonial regimes (Howse 2007). Odious debts were contracted by the colonial regimes with a view to attaining objectives that were prejudicial to the major interests of the successor postcolonial governments or states or the local population (Nehru *et al* 2008). The World Bank, which now paradoxically claims that African governments and states are indebted to it, generously loaned funds to criminal colonial governments including the Belgian, French and English authorities – upon gaining independence, South Africa and Zimbabwe, for instance, were then forced to pay the odious debts (CADTM International 8 August 2008) in ways that wrecked postindependence economies in Africa.

Instead of compensating Africans for enslavement and colonisation, Euro-Americans have ironically forced Africans to pay for being enslaved and colonised – and the assumption in this is that the colonisation and enslavement of Africans were heroic acts. There is a paradox in condemnations of African struggles for restitution and reparations as contrary to human rights, to democracy and rule of law (Mhanda 2003). Such condemnations sadly presuppose that it is human, democratic and legal for Africans to be dispossessed, exploited and then forced to pay compensation for being colonised and enslaved. The point here is that a focus on demonising African struggle to repossess their resources is preposterous. The claim that African struggles for restitution and reparations are against human rights, democracy

and good governance erroneously presupposes that the neo-colonial status quo is itself consistent with human rights, rule of law, democracy and good governance.

When Africans claim compensation for enslavement, colonial dispossession and exploitation, the paradox is that they are often told that the past does not matter anymore and that it is more important to look up to the future. They are encouraged to look up to the future wherein more and more prisons are being built for the descendants of the enslaved and the neo-colonised – and, sadly, it is the descendants of the colonialists and enslavers who build these prisons. From the BlackLivesMatter, the disproportionate incarceration of African Americans and the selective indictment of African leaders at the International Criminal Court (Nhemachena and Bankie 2017), there is a clear message that the future of Africans is in the prisons which are ironically built using the money that is supposed to compensate them for enslavement and colonisation. Thus, while British families became wealthy due to the enslavement of Africans, the enslaved Africans were not compensated upon the “end” of the enslavement era. Many British families were enriched by the enslavement of Africans; these families include British former Prime Minister David Cameron’s ancestors, Former Minister Douglas Hogg and Henry Lascelles, an ancestor of the Queen’s cousin (Independent 24 February 2013). Similar to the contemporary era wherein African victims of colonisation have not been compensated but rather forced to pay compensation for being colonised, the enslaved Africans were not compensated. Instead of the enslaved Africans being compensated, the British governments have paid millions and billions of pounds in compensation to the British enslavers or slave owners for the supposed loss of their slaves. In this regard, the wealthiest British families are former slave owners and they are still indirectly receiving the benefits of enslaving Africans: the British enslavers subsequently invested in transport, including railways which are erroneously attributed to the industrial revolution (The Independent 24 February 2013).

So, while the British and Americans for instance refuse to compensate Africans for enslavement and colonisation, the British government in 1833 used 40% of its national budget to compensate British slave owners – the amount was so large that it was not paid off until 2015 (The Guardian 12 February 2018). The compensation was paid off to 46, 000 slave owners to compensate them for their supposed loss of human property (The Guardian 12 February 2018). Paradoxically, when Africans claim compensation for enslavement, they are told that the direct victims of enslavement are long since dead (Fortson 2004). However, the United States of America and the Germans paid reparations to the victims of the Nazi regime and to the remaining Japanese-American survivors of American World War II internment camps (Fortson 2004; The Washington Post 29 September 2016). On the other hand, the Euro-Americans

consistently refuse to compensate Africans, who were enslaved and colonised, in spite of claims by the descendants of enslaved and colonised Africans (see Tribune 15 October 2013; Brophy 2004). Thus, while Caribbean and African leaders are demanding financial compensation for slave trade, the Euro-American descendants of the enslavers argue that they are not responsible for the crimes of their forefathers and they argue that they have grown rich owing to their own hard work and innate talents (Brophy 2004).

Instead of compensating Africans for enslavement and colonisation, the former British Prime Minister, David Cameron, announced that he would offer 25 million pounds for the construction of prisons in Jamaica so that foreign criminals in Britain can be sent home to serve sentences in the Caribbean (BBC News 30 September 2015). Thus, the neo-imperial order expects Africans to be resilient and to avoid disrupting the existing world order. If Africans fail or refuse to be resilient, they are locked up in prisons that are unfortunately built using money which is supposed to constitute reparations for enslavement and colonisation. Instead of addressing challenges and problems originating from the enslavement and colonisation of Africans, the Euro-American world evades the challenges. So, problems in Africa are simplistically explained in terms of lack of resilience, absence of the rule of law, African population growth, poor governance, absence of democracy and bad human rights records on the part of African governments (Jacobsen 24 September 2015; Husain *et al* 2016). Instead of addressing the problems of enslavement and colonial dispossession in Africa, the Eurocentric thinkers explain the problems in Africa in terms of lack of entrepreneurial skills among African youths (Moore 2005). Instead of addressing problems of enslavement and colonial dispossession, neo-empire is happier just harping about Euro-American economic growth, development, modernisation and productivity all of which sadly and erroneously presuppose that there was no economic growth, development, modernity and productivity in precolonial Africa.

Conclusion

The emergent workless societies, dominated by humanoid robots and Artificial Intelligence, cause one to wonder what the future will be like for Africans who were dispossessed of their land and other resources. Landless and workless, African futures are blighted and not bright. The contemporary assumptions that Africans can rely on employment rather than on repossessing their land and other resources are ill-founded. They are ill-founded because the jobs are in fact being taken over by humanoid industrial robots that are replacing human employees. Because African academies do not teach anticipation studies or studies about expectations, Africans are ill equipped to anticipate their

futures. Foresight studies would assist Africans in planning their futures in the light of their past and present. Because of absence of foresight and foresight studies, Africans would have difficulties in mapping their futures. The argument in this chapter is that without land and without jobs, Africans will in future become more precarious as humanoid industrial robots proliferate and take over the jobs. In the emergent workless societies, African governments and states will disappear, as they will have no one to tax for revenue. In the workless societies, Africans will have little, if any, motivation to pursue education. In this sense, a workless society will be a deschooled society. Thus, the emergent societies will be stateless, governmentless, landless and jobless or workless - Africans will be destined for extinction.

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Re-Africanisation of Economies through Ubuntu? Business and Kinship Obligations in Urban South Africa

Phefumula Nyoni & Sibonokuhle Ndlovu

Introduction

The post-apartheid South African cities and towns have been characterised by marked reinvention as a result of large scale rural-urban migration and the general lifting of movement-restrictions that were associated with the apartheid state. Africans from various kinship groupings coalesced within these cities and towns in search of better livelihood opportunities. Of importance are the socio-economic re-imaginings of emerging towns such as Ntabankulu where African owned small businesses have come to play an important role in the ways in which the Africans have sought to deal with the dictates of capitalism. The post-apartheid large scale rural-urban migration into large cities such as Johannesburg and Cape Town are not uncommon in areas like Ntabankulu. On the contrary, in Ntabankulu most of the persons are involved in one form of business or another and tend to reside in the town's periphery which usually forms part of their respective areas of origin. This cohort of business persons presents an important focal point in that they find themselves having to operate in spaces close to their kin and communities of origin creating a prolific environment featuring the inevitability of kin and community obligations playing a leading role in shaping the resultant relations.

This chapter is written in light of challenges that have emerged due to the failures of neo-liberalism such as unemployment and poverty as well as the perceived incompatibility between kinship and business obligations, especially, within the post-colonial era. This aspect is linked to the failures of neo-liberalism and related promises of large scale "investments" by multinational companies. Whilst such failures of neo-liberalism are more pronounced in cities, research has shown that such failures have historically equally featured in peripheral towns such as Ntabankulu. The situation has been worsened by the neo-liberal philosophy that has tended to promote the capitalist tendencies that have historically been responsible for marginalising and alienating African values and practices. Of interest in this chapter are the ways in which groupings of African-owned small businesses have emerged as variants in dealing with the dictates of

capitalism. In positioning their initiatives as livelihood variants, African business owners have had to strike a balance between business and kinship obligations.

The act of balancing kinship and business obligations though complex in the context of neo-liberal thinking where the two are said to be incompatible presents an important opportunity of how African centred socio-economic initiatives can be explored and promoted. This focus is important in light of the increasing calls for the reinvention of African values across the core spheres that include the political and the socio-economic entities. These preceding arguments are therefore significant to the chapter's underlying argument that relates to how the actions of the African business owners can be understood within the context of re-Africanisation of African economies. This becomes a rallying point for the central theme of this chapter which argues that the lingering kinship obligations facing African business persons albeit within a capitalist environment ought not to create a misconception that such businesses are inadequate in sustaining the evolution of an industrial economy. It follows that the advent of obligations that are explored in this chapter particularly within the context of the reciprocity aspect of *ubuntu* need to be viewed as an important cog if balanced pedagogical explanations are to be attained within the context of exploring a possibility of re-Africanising economies through reliance of African values of *ubuntu*. It must be noted that Ubuntu particularly its humanistic notions are heavily embedded throughout the entire stages of African groups right from socialisation of children up to the obligations expected in handling interrelations between individuals and groups. Whilst the particular individuals or groups interacting might not be expected to return a good deed instantly they are groomed into the spirit of such a good deed being somehow returned in one situation or another. It is this important humanist element that draws from *ubuntu* that is explored in this chapter within the context of reciprocity. It therefore follows that conceptually the arguments on this chapter are informed by reciprocity in both its theoretical and practical connotations. Understanding issues from a reciprocal view point will assist in the narrowing of the focus so as to avert being dragged into an all-encompassing debate around *ubuntu* in its broad and complex terms. This is by no means a way of reducing *ubuntu* to reciprocity but it presents an insight into the fact that despite the relations between business persons and their kin appearing to be deeply entrenched in mutual assistance with little or no expectation with regards to a particular good act or deed being returned in future, in reality a lack of reciprocity has always brought a dent and conflict to the relations.

Molm (2010:119) notes that reciprocity, the extension of benefits to another in return for benefits received, is one of the essential features of social exchange and social life. In the same line of argument, Molm further reveals that as early as the beginning of the 20th century scholars such as Hobhouse noted the

importance of reciprocity as the vital norm of society whilst Simmel equally argued that social stability and unity could not exist without the “reciprocity of service and return service” (Molm 2010:119). In a similar view related to trustworthiness and reciprocity being more of a collectively acquired trait than biological, Knight (2008:61) notes that instead of humans submissively accepting ‘facts’ of their biological relatedness they rather collectively shape and reconstruct those facts. It follows that descent group membership, marriage and property are facts only if people believe in them although it needs to be emphasised that the aspect of human belief on facts does not in any way reduce them to mere distortions or hallucinations (Knight 2008:61). The concept of reciprocity has been overlooked for one reason or the other. This is so especially considering that the focus has been limited to the form of exchange that involves only a single type of reciprocity, that is, two party direct exchanges in which bilateral agreements are negotiated. In that regard, Molm (2010:119-120) argues that in reciprocal exchange actors perform distinct acts that assist another, like giving help or advice without negotiation and without knowing whether or when the other will reciprocate. This will be important in understanding how business persons may find themselves cooperating with kinship members even if it means compromising business obligations. As has been indicated in the preceding arguments, business persons and their kin act without any expectation that such action would be reciprocated in future. What becomes important in this argument is the contribution of reciprocity towards fostering an *ubuntu* oriented philosophy characterised by interconnectedness and harmony. Cohesion in essence is also crucial in exchange relations and constitutes the actor’s valuation of the connection to another as one of unity and harmony, a cooperative act that is reciprocally valuable to both parties.

Elements of interconnectedness in African communities have been reported by a significant number of scholars within the ambit of *ubuntu* although its influence on socio-economic relations has always been undervalued. In efforts aimed at presenting the importance of identity creation among African communities, Goduka (2005) reveals how individuals promote the maintenance of ties with their communities, particularly birth places where social groupings are organized in clans. She expresses this by presenting sentiments that are usually echoed such as represented by the phrase; “....*kwaManxebe, e-Heshele, apho inkaba yam ikhoyo* (where my umbilical cord is buried)...” (Goduka 2005:3). Goduka (2005:3) goes on to indicate that “this shared principle fosters a sense of being together, a belongingness and interrelatedness with people, land and nature”. Whilst noting the challenge of romanticising reciprocal cooperation within a kinship setting especially in light of the conflicts that feature within actor interactions, it remains important to nonetheless view kinship largely as an important component of African identity and exclusiveness where space is

shared and a spirit of interdependency governs relations. It is such features of *ubuntu* that this chapter explores especially with respect to how it has been reinvented and become embedded within African ways of transaction *albeit* within a capitalist setting.

The understanding of kinship obligations within the context of re-Africanising African economies is therefore pursued through an approach that explores how reciprocity and associated practices define African business relationships at business and kinship levels. It follows that where levels of reciprocity are high either in real terms or in terms of perceptions there is an equal likelihood of greater cooperation and lesser chances of conflict between the parties involved. This piece therefore presents arguments that support the view that kinship obligations are neither retrogressive to business nor peculiar to African businesses. In essence kinship and business obligations ought to be viewed as two sides of the same coin. This consequently implies that the reciprocal relationship between business owners and kinship members which is key to the survival of both can only be downplayed by those under the shackles of the ever dominant and alienative Eurocentric tendencies.

An African Pre-colonial Era History of Doing Business

Screpanti (1999:1) indicates that attempts to define capitalism have suggested that it is an economic system in which control of production and the allocation of real and financial resources are based on private ownership of the means of production. This has been too limited to properly define the capitalist forms prevailing in modern industrialised economies. This definitional failure can be said to be glaring in emerging economies particularly in the small towns such as Ntabankulu where the rural-urban context boundaries are highly blurred, that is, if ever they can be traced at all. Of further importance in the efforts to reconstruct capitalism is the notion that even if modern capitalism was to be mainly based on private ownership, it can equally not be disputed that in the current 21st century environment there seems to exist a multiplicity of institutional arrangements capable of regulating the development and functioning of economies. Consequently, the transformations that lead to neo-forms of capitalism have impacted the development and functioning of economies through a complex process of contradictions that cannot be easily explained through conventional explanations. Considering such arguments on the complex nature particularly in respect to the 21st century capitalist forms, Screpanti (1999:2) thus adds that what hinders our ability to grasp and embrace the different forms of capitalism as specific forms of unique and general mode of production is the widespread acceptance of a traditional notion of ownership according to which a property right ties the claims on 'enduring' control and on

‘enduring’ income. This notion ignores the fact that within the pre-colonial context Africans were already engaged in mining industries, mineral smelting and artefact and ornament making businesses, weaving industries. It therefore needs to be emphasised that African business enterprises in their various forms predated Euro-modernity and cannot be reduced to an exclusive principle of colonial forms of doing business. It is the resilience of African values within contemporary business practices in which Screpanti’s (1999:2) view that the various norms involved in the capitalist processes may be defined by law, others by custom whilst others may even be embedded in the collective values and beliefs of a society. It is within this ambit that *ubuntu* and its associated traits come to present crucial insights regarding the nature of relations within the contemporary business spaces.

Gupta (2002:281) notes that it cannot be an overstatement to argue that the arrival of the 21st century, historically speaking, possesses some striking similarity with some of the socio-economic features of the 20th century and even the period before. This becomes even more complex if one considers the view of Drahokoupil (2004:839) who posits that a person’s economic behaviour is not necessarily influenced by an individual’s economic interest but rather by their social interest. The implication being that the principles of economic behaviour are determined by the socio-institutional patterns that are dominant in each society - effectively meaning that individuals act to gain social assets. This further highlights the continued importance of non-economic institutions for the current evolution of economies. This important role draws from the pre-industrial society where the non-economic institutions symbolised the humanistic notions of business which capitalism mostly lacks.

In explaining the embeddedness of the economy in non-economic institutions, Drahokoupil (2004:839) alluded to the view by Polanyi in which he stated that the economy in pre-industrial society was embedded in social, political and religious institutions and there were no distinct institutions based on economic motives of individual behaviour. This presents a strong contrast with capitalism which thrived on its quest to alienate the non-economic institutions. Drahokoupil (2004:839) further adds that the economic transformations that took place in the Western society led to a reversal of processes such that instead of the previous situation whereby the economy was embedded in society and dictated by the social processes, it became society that was embedded in the economy with economic processes dictating terms. Euro-modern societies are said to be characterised by some form of interaction that doesn’t rely on face to face interaction. This involves an economic system that is driven by the motive of gain and nothing less than to maximise profits. It can however be noted that such analogy may be too simplistic in understanding business practices within the South African context in particular and in African

communities in general. It could be simplistic in the context of the complexities surrounding the relationship between the social and economic institutions within the 21st Century capitalist system. It can thus be argued that the complexity of 21st Century capitalism relates to the contradicting processes that are highlighted by the expansion of markets and their so called disconnections of physical encounters on the one hand. On the other hand lie the efforts by society aimed at countering the 'ills' of capitalism through various aspects of redistribution located within social institutions. In support of this critique Drahekoupil (2004: 842) concurs that the problem is that the separation of the market and the subordination of society to it are not possible. Drahekoupil adds that such a situation has never been attained in the history of mankind and merely represented a utopian goal of the ideology of market liberalism.

According to Smith, the key question needing exploration when dealing with petty commodity production has been how to conceptualise the articulation between capitalist and non-capitalist forms of production (Smith 1986:29). Although the issue of the existence of exploitation between various forms of production has been highly contentious, with the linkage of the forms of production proving to be a difficult task, there appears to be exploitative relations between economic systems rather than between classes. Smith (1986:31) raises the view of Khan who highlighted that not only does petty commodity production vary in form with different modes of production being commodified through connections with a larger external economy, but he also saw no mechanism of surplus appropriation. Smith (1986:32) goes on to dispute Khan's formulation as it leads to a singular dimension of the production process among petty commodity producers being lost largely because it is not usually the individual producer who is linked to all others through the market, as in capitalism but rather it is a household often organised despotically and patriarchally. Smith further extends the argument by noting that whilst communal bonds may be broken by the market, it is not so for the domestic units which organise production.

When it comes to understanding capitalist forms, it has been argued that neo-classical and orthodox Marxist arguments are said to be far too simplistic, with the general tendency of lumping together all forms of non-capitalist production into one general form, supposedly consisting of everything that capitalism is not (Smith 1986:35). It is such biennial views that this research seeks to unravel as they create a false impression of 'purity' in relation to defining boundaries of either capitalist forms or non-capitalist forms. On a similar note, Meillassoux (1981:141) notes that one of the key contradictions facing capitalist development comes from the persistent use, even within the most developed countries, of the family to reproduce the social ingredient which up until now has fed capitalism with the 'free labourer'.

One may then argue that capitalism in the 21st century takes various contradicting forms, with elements of non-capitalist forms such as *ubuntu* and its related traits being reinvented. Within the South African context such contradictions especially take place with regards to groups involved in various forms of business initiatives in what has come to be commonly known as the margins of the mainstream economy. The contradictions also occur amid a context of strong contestation mainly as the local groups seek a return to African values. This is further reflected in their day to day practices where the usage of clan names is highly pronounced. Smith (1986:40) raises an important view drawn from Burawoy in which he points to the impossibility of separating politics and ideology from the other elements involved in a production regime. This view can be equated to the evolution of capitalist forms in which what happens in one place cannot be separated from the processes occurring in other places. This is so particularly in relation to the emergence of the world market where commodities are exchanged. It therefore follows that instead of seeing peasants and with respect to industrialising economies, small business operators resisting commodification, Smith sees them resisting separation from their means of production. The implication is that the groups in precarious positions usually attempt to engage in a commodity economy without losing control over their subsistence economy (Smith 1986:40).

Beyond Reciprocal Cooperation as a Form of *Ubuntu* and Capital

The chapter presents an important dialogue surrounding continued resilience of customary forms particularly those linked to reciprocal cooperation within the 21st century. This is the case despite the fact that the same kinship obligations have notably exhibited conflictual features particularly within a business and clan context. The chapter also explores the complexities involved in balancing kin and business obligations especially in relation to the views levelled on 'Black' business persons as 'well-off' and therefore expected to extend the most financial support to clan members. Whilst for some who have succumbed to the 'un-African' worldview perceive kinship obligations as burdensome, there is an equally strong sense that kinship obligations ought to be seen as a form of kinship capital from which an individual can draw inspiration. In essence, an important question on reciprocity relates to whether it entails exchanges of roughly equivalent value in a strictly delimited sequence or involves an ambiguous definition of equivalence, that is, one where emphasis on indebtedness and obligation takes a complex turn. The chapter further presents an analogy on the prevalence of conflict on clanship relations.

It follows that the intricacy that manifests in kinship and business obligations particularly in relation to the reciprocal facet of *ubuntu* ought to be

viewed from an indigenous scientific viewpoint and not just as ordinary or coincidental phenomena. In this respect, it is important to explore this relationship and its contribution to the re-Africanisation of economies agenda as an important foundation that can be drawn upon in the promotion of an industrial economy especially for communities that exist within the margins of the mainstream economy. Instead of seeking for solutions inclined towards emphasising the neo-liberal mantra concerning the need for ‘professionalism’ with regard to the way obligations to kin and business are managed, it is crucial to expend more energy towards understanding how reciprocity as an important component of *ubuntu* can be used to promote the local business economies. It is possible that a solid reciprocal foundation between business persons and kin members can be further cascaded into the broader community relations to produce stronger ties that have the capacity to further enhance the African owned businesses and the local economy at large. Not only will this provide the much needed African identity for the local business community but it will also play a crucial role in ensuring that the interaction of these entities with the central economy is competitive.

Whilst there is no doubt that the African business persons have a lot to learn from the Euro-modern science and technological principles, it would be naïve to believe that blindly embracing these in an all size fits all fashion will assist them in dealing with the quest for professionalism. It can be averred that the African *ubuntu* philosophy as manifested through reciprocity ought to inform the actions of African business persons as they deal with business and kin obligations. Embracing science and technological principles without grounding them on African values leads to a decline in the moral fabric among the business persons. This makes it difficult for them to value, promote and draw from the locally available forms of capital such as reciprocity.

The Reciprocal Element of *Ubuntu* and Obligations

Powell (1990:304) argued that reciprocity is crucial to discussions of *ubuntu* particularly in relation to the construction of the humanist features of cooperation and network formation among various groupings. An important question in studies relating to reciprocity relates to whether it entails exchanges of roughly equivalent value in a strictly delimited sequence or whether it involves a much less precise definition of equivalence, that is, one that views notions of indebtedness and obligation as complex. Anthropological and sociological analysis of reciprocity are said to be commonly rooted in and according to such a view, a measure of imbalance that sustains the relations thereby compelling another meeting by the different actors involved (Powell 1990:304). It can therefore be argued that obligation constitutes a means through which practices

remain connected to one another. In addition, it can be noted that calling attention to the need for equivalence might well undermine and devalue the relationship. Powell (1990:305) further added that reciprocity is a long term process, which as noted by Mauss goes beyond the simplicity notions of rational calculations as it embraces cultural tenets that provide objects with their meaning and significance and providing a basis for understanding the implications of their passage from one person to the other. Following such an analogy, Powell (1990:305) has concluded that cooperation thus emerges out of mutual interests with behaviour being based on standards that no one individual can determine alone. It is in such a process that trust is said to be generated and playing a lubricant role to exchange. Powell (1990:305) extended his argument on trust by making reference to Luhmann who noted that by trusting another party one treats as certain those aspects of life which Euro-modernity rendered uncertain. It is through such a process then where trust is seen as reducing complex realities far more quickly and economically than prediction, authority or bargaining.

Reciprocal Cooperation Influences on Kinship Relations and Obligations

Reciprocal cooperation particularly in urban spaces has survived the impacts of urbanisation as is noted through its existence within family, kin and business associations, *stockvels* and burial societies among others. White (2010) has also emphasised the importance of kinship ties among South African urban dwellers that in some instances return to their birth places or upon receiving advice from healers to travel back to their rural areas to connect with other kin members in order to have some ailments dealt with. In a similar line of argument, Koll (2009) and Boon (2007) have noted that wider kinship links were continuously part of the Africans strategies of securing a livelihood. This is despite the fact that the same kinship obligations are alleged to have exerted levelling tendencies and inhibited the accumulation of exceptional wealth. Such an accusation has always been disconnected from African realities and has formed part of the neo-liberal misconceptions that have been responsible for spreading the alienating rhetoric against African values and practices. Knoll (2009) further cautioned that we should not under-estimate the resilience of the African values and institutions to linger on as models for modified behaviour under a wide range of circumstances. It follows that we should not discount the creative power of people to adapt their cultural resources to new situations rather than to adopt, by imitation the cultures of others. It must be noted that customary values of kinship have been an integral part of communities and they have evolved with the different phases of socio-economic transformation to play important roles.

The Paradox of Balancing Kin and Business Obligations within Neo-liberal Spaces

The capitalist system in its contemporary form especially within the South African context and across the African context at large is beset with contradictions between the capitalist and non-capitalist forms of production. It is in this regard that respondents who participated for this piece pointed to the complexities involved in balancing kin and business obligations especially in relation to the perceptions in which business persons within kinship groupings are viewed as economically well-up and consequently expected to extend the most economic support to kin members. It is in that regard that Daluxolo (Daluxolo, one of the respondents is a 35-year-old man whose clan name is Nxontsa) noted that because he owns three shops, kin members are holding perceptions that he has lots of money than even those kin members who are employed in higher income positions. He added that contrary to such popular claims his businesses are sustained by his managerial and saving skills and are not as well up as alleged by kin members.

The study also revealed how business persons have tried to assist kin members as part of obligations to empower them but without success in some instances. It is in that regard that Bongikhaya pointed out that when he realised that his business was doing well he tried to assist his brothers to start their own businesses. He revealed that he gave them money to go and buy their start-up stock and for paying rentals. He however complained that instead both of his brothers chose to take the money and waste it on alcohol and luxuries. Bongikhaya also indicated that, that was the last time he tried to assist them financially. He further pointed out that his brothers behaved this way because they know they will never go hungry while he has money and he noted that is true as he would find it hard to stop assisting them. Having failed to find anything positive in assisting his family Bongikhaya (Bongikhaya is a 42-year-old man whose clan name is Jola. He is also one of the respondents) noted that he took his bakkie and gave it to his mother's last born thinking that he would be different from others. He added that he expected him to use the bakkie for hire by people who would have bought bulky items that cannot be transported through public transport.

In an explanation showing contradictions inherent within obligations that business persons engage in, a female respondent Nongayindoda revealed that sometimes she finds herself having to stretch her obligations as she would feel obliged to intervene. Nongayindoda is a 44-year-old woman and business owner of three shops. Her clan name is Nuba. She is commonly known as MaNuba. Nongayindoda owns three shops and a bus. She gave an example of when she finds a child belonging to a kin member without school shoes and she just buys

the kid the shoes because she understands from her personal experiences how embarrassing and painful it is for the child. She added that she does that without expecting anything in return but gets satisfied by the deed. She reiterated the African cultural practice of placing all kinship obligations on a particular kin member to be the head, something which is passed on to other generations. Nongayindoda also indicated that a kin head is expected to have a wife and take care of others. Of importance is her conclusion that it is not easy to balance the obligations of kin with those of business at the same time. This highlights the blurred line between business and kin obligations as well as the paradoxical nature of balancing such obligations.

In pointing to the paradox surrounding balancing kin and business obligations Andile (Andile is a 26-year-old man who belongs to the AmaMpondo group and whose clan name is Dlamini) pointed out that he finds it difficult to balance business with kin obligations. He thus noted that he is always at the shop to oversee obligations such as stocking and other business related activities. He also revealed that he does make an effort to make time to be with his kin and do things that need to be done at home during the weekends because he takes an early break from business for that purpose. In a similar case Mxo explained that having children brings a lot of responsibility because he has an obligation to meet their day to day needs. Mxo, is a 39-year-old male respondent who owns three saloon businesses at Ntabankulu town. Mxo belongs to the amaMpondo and his clan name is Delwa. He added that because he operates close to his home, he gets to shoulder more kin obligations than kin members who work far from home. He revealed that things that need to be fixed have to be fixed by him due to his proximity to home. He added that part of the complication relates to the fact that having his own business and not working for someone creates the perception that he has lots of money. He also highlighted that this perception that he is 'moneyed' motivates his siblings and other kin members to negate their kin obligations as they pass on most of the obligations to him. In a similar case Andile also explained that he usually makes sure that he is present whenever there is some kin gathering. He added that whilst he may try his best to spend time with his kin during weekends he feels that he might be giving in too much to the kin obligations. He added that he presented this view considering that for other business persons, business is very important. It is so important that those particular business persons even leave their kin to run business in other areas away from home and remain there for longer periods that may extend to a whole year or more. By this Andile sought to imply that his proximity to home is a double-edged sword.

In an argument relating to the complexities faced in balancing business with kin obligations Mxo narrated the difficulties involved in balancing business and kinship obligations. He presented explanations related to the influence of

cultural dynamics on balancing business with kinship in his culture, that is, the Mpondo culture. Mxo elaborated by stating that an increased burden of kin dependents has negative impacts on his capacity to fulfil business obligations. This includes obligations such as renovating and upgrading the business. To further confirm the challenge of having to deal with increased kin obligations as being burdensome Mxo added that most of the profit he generates from his business initiatives tends to be spent on their daily requirements. He thus revealed that even if sometimes he saves money for upgrading the business, his kin expect him to solve all issues requiring money. Mxo further explained that when faced with such situations he usually conforms not because he would be financially capable but rather to save himself from the ridicule that is attached to non-conformity. Such pressure according to Mxo compromises his business obligations immensely.

Despite the plethora of challenges faced by business persons in their quest to deal with kinship and business obligations, the humanist African value of Ubuntu manifested in the strength of reciprocal cooperation remains key in understanding its role in the re-Africanisation of economies. It is in this regard that other respondents pointed out that in uncertain communities there is greater compelling pressure to find ways of dealing with balancing kin with business obligations. In that regard Zamo – a 42 year old woman who owns a restaurant, Bed and Breakfast outlet as well as a tavern – noted that business people have ways of balancing business and family obligations. She belongs to the amaMpondo and her clan name is Mpinge. She is referred to as MaMpinge. She added that the first thing business people do is to limit the number of dependents by supporting kin in starting their own businesses.

The Variance between Western and African Approaches to Resolving Family Conflicts

Susser (2010:S229) noted that Gluckman's perspective, although highlighting the importance of conflict in the transformation of capitalism, carefully specified the political forces for cohesion. In essence, Gluckman emphasised the need to posit a theoretical system in equilibrium, which is to assume that within a crisis or conflict there would be social mechanisms that would perpetuate or maintain the social system. In explaining this point Mxo pointed out that as kin, they have had disagreements like any other grouping. Mxo further indicated that in most cases the mother-in-law usually engages in conflict with the daughter-in-law due to perceived changes in the way she would have related with her son before he was married. He alluded to the point that his mother could have become accustomed to receiving assistance directly from him but due to the marriage, she could be uncomfortable with having to deal

with her daughter in law. He added that to deal with the conflicts, kin usually recommend that the son should build a separate homestead for his wife. However, this does not eliminate the conflicts, as the mother in law still feels aggrieved by having to deal with her son indirectly through the daughter-in-law.

In explaining some of the clanship conflicts Mxo pointed to some disagreements between members surrounding the handling of customary practices that are done when a kin member passes on. He thus revealed an incident in which after the death of one of his married brothers, the widow refused to wear *izila* claiming that she was now a Christian. Mxo also noted that the refusal by his sister in-law to wear *izila* brought tension and confusion to the kin because in their culture they knew that when the husband passes on, the widow should show respect by wearing *izila*. He went on to explain that a meeting was called with all the elders of the clan where a decision was taken that when a clan member decided not to abide by clan customary practices they should call for a meeting and publicly declare their decision.

It can be noted that the refusal of Mxo's sister in law to wear *izila* due to her Christian background ought to be seen as one of the instances in which society finds itself going through transformation in which case customary practices are usually an example of such institutions prone to change. This institutional transformation that targeted rituals in this instance, can be explained using the works of Mauss (Hart and Ortiz 2014). Of importance in the works of Mauss was his key modification to Durkheim's legacy where he sought to conceive society as a historical project of humanity whose limits were extended to become ever more inclusive implying that society could not be taken for granted as a pre-existent form. Instead society ought to be made and remade, sometimes from scratch, implying what can be construed as radical changes or 'shocking' as implied in the reaction of Mxo (Hart and Ortiz 2014:468).

In a similar case of conflicts arising due to kin misunderstanding, Dalumzi averred that sometimes conflicts arise due to differences relating to kin member's children being dishonest in business. He revealed that there has been an instance of a kin member approaching him with her son and asking him to employ the son so that he could earn a living for the family. Dalumzi indicated that having decided to employ the kin member's son after a while he noticed that the son was getting arrogant and defying expected conduct within the business. Dalumzi went on to explain that when he tried to intervene by rebuking the young man, he couldn't succeed and he was then forced to present the matter to the boy's parents. Dalumzi however faced defensive parents who strongly refuted the alleged misbehaviour by their child and so they sided with their son. Dalumzi added that this defensive position of the boy's parents left him in a difficult position as he could not dismiss him but rather he had to keep

him just to maintain peace with kin members. This meant that he had to keep an unproductive employee simply because they belonged to the same kin group.

Conclusion

It can be concluded that customary practices such as clanship have been resilient to forces of Euro-modernisation and influences of urbanisation. Kinship in its various facets and related obligations can therefore be seen as an important aspect of capital for Black South African business persons. This belies some views that customary practices are detrimental to progress especially within the business context. It has been pointed out that in most instances business persons are usually compelled to fulfil both material and non-material obligations as by owning a business they are perceived as having unlimited financial capacity to fulfil the obligations. The businesspersons are usually put under pressure to ensure attendance to kin meetings and ceremonies as their absence is usually condemned. Some kin members have underscored to businesspersons that even if one has money it cannot bury that person – they hinted that money cannot provide the kind of emotional support that kin members usually provide in times of need. Thus, obligations to the kin group remain an inevitable part of businesspersons. One can also conclude that even though a kin member may be unhappy about the level of cooperation and reciprocity displayed by their kin counterparts they are nonetheless compelled to fulfil obligations wherever they are called to do so. This compulsion to fulfil expectations even ‘under protest’ further points to the strong influence of kinship.

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The Land as Economy and Economy as Land: Towards a Re-appraisal of the Political Economy of Land Repossession in Contemporary South Africa

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The post-colonial era did not bring about a “break where the ‘old relations’ disappear forever and entirely new ones came to replace them.... ‘the colonial’ is not dead, since it lives on its ‘after effects’ (Hall 1996 cited in Chigwedere 2015:4).

Introduction

In the context of political liberation (reduced/narrowed to democracy and human rights) which has not brought economic liberation/economic freedom and decolonisation, South African pan Africanist groups would be better understood with the above quotation because it succinctly describes the core of contemporary pan-Africanism in South Africa. These pro-Black, pan-Africanists and land-based groups in South Africa are largely comprised of young born-frees, who are radical and unapologetical about the need for the return of stolen land. These young pan Africanists have boldly challenged the so-called “Rainbow nation” (which hides under Nelson Mandela’s Madiba Magic) that provides sham decolonisation, while on the other hand delivering neo-liberalist rhetoric and practices. At the core of these pan-Africanists groups is the demand of a genuine decolonisation, the genuine dismantling of apartheid’s faces in society and not appeasing apartheid because of the fear of white tears or the fear of consequences (Tafira 2016). Pan-Africanists often argue that land repossessions must take place without any excuses. Thus, land repossession in South Africa remains the most controversial, politicised and sensitive topic, in the context of the slow pace of land repossession, as well as stubborn inequalities, slow economic growth, together with lack of economic liberation for most Black people, who are ravaged by racially based inequalities, poverty and high unemployment rates. Ever since the Economic Freedom Fighters (EFF) party was formed in 2013, after a bitter fallout with the then ruling African National Congress (ANC) and President Jacob Zuma, the land question, together with other decolonisation efforts have been pushed to the forefront of the South African contemporary politics. The EFF, a radical/leftist

South African political party, has managed to project itself as the champion of the poor by mobilising the disenfranchised poor Black community to rally behind their land “expropriation without compensation” policy, or nationalisation of land. The EFF has pursued the policy because the ruling ANC has failed to lift people out of poverty or bring about economic freedom and decolonisation (Cousins 2016; Kepe and Hall 2018:128).

The EFF, just like most South African pan-Africanists, such as Black First Land First (BLF) group, Abahlali baseMjondolo (Shack Dwellers) and others, also talk about “rich white farmers” who are derailing land repossession efforts because of their reluctance to sell land (Zukowski 2017). For the EFF and other pro-Black pan-Africanist groupings, the Dutch white settlers have been stealing Africans’ land since they arrived in 1652. Therefore, the unapologetic return of that land to Black people would be the beginning of decolonisation and the restoration of Black people’s dignity (Kepe and Hall 2018). We use the terms radical/pan-Africanists/populist groups to refer to anti-neoliberal grassroots and pro-Black organisations who are fighting against racially-based plunder, theft, exploitation, injustices, inequalities, social hierarchies, poverty, unemployment and poor living conditions faced by the poor Black majority in South Africa. This chapter underlines that most South African pan-Africanists hardly talk about “land reform” and theirs is the struggle to return “stolen” land or land repossessions.

There are three types of contemporary “land reform” programmes, which are land redistribution, wherein any Black South African can apply and get land for farming, then there is land restitution, a rights and claims-based programme wherein the victims of apartheid era theft of land can claim for their land, or be given alternative land or cash compensation. The third “sub-land reform” programme is tenure reform, which protects farmworkers from arbitrary evictions or any communities living in areas where there is insecurity of tenure, such as communal areas (Cousins 2008:3; PLAAS 2016:4). Since 1994, the ANC governing party has long shied away from taking a radical stance on “land reform” (preferring a white dominated markets-based approach), fearing negative reactions from looters who disguise themselves as “investors”. Even the current ANC’s radical stance appears rhetorical and the ANC appears to be trying to please poor Black voters and pan-Africanists because the ANC has been losing votes (Cousins 2017; Ntsebeza 2018; Cousins 2018).

There is no doubt that the EFF has kept the ANC on their toes as they have managed to persuade a number of disenfranchised and disillusioned South Africans (especially the youths) (Ntsebeza 2018). The ANC ultimately endorsed the “expropriation without compensation” principle in their 2017 Conference and eventually the ANC, with the assistance of the EFF voted in favour of “expropriation without compensation” Bill in Parliament in 2018. This was also

interesting given that earlier in March 2017 the ANC had rejected the EFF's offer of their 6 percent minority in Parliament to vote for an amendment of Section 25 so as to remove the requirement of the state to pay "just and equitable" compensation to white farmers after expropriation (Merten 2017). The debates around Section 25 of the Constitution (property protection clause) and "expropriation without compensation" have been heating up. There is a huge chorus on land acquisition for "land reform" and less on what happens when land has been identified, offered and/or acquired. However, the High Level Panel on The Assessment of Key Legislation and The Acceleration of Fundamental Changes report published in 2017, which was headed by former president Kgalema Motlanthe, argued that the problem is not the Constitution, but rather the implementation of the Constitution, corruption, poor political will and poor leadership. In the context of massive unemployment, a struggling neo-colonial economy, continuing poverty, and racially based inequalities, pan-Africanist groupings have found some followers amongst Black people persuaded by the agenda for radical land reform programme. The "illegitimate" occupation of land by white people remains not only an abomination, but also a symbol of neo-colonialism, whiteness and the occupation of land by white farmers has been described as the main cause of the poverty and plight of Black people. Thus, there is general agreement amongst most South Africans that the land question has to be solved one way or the other (Cousins 2013).

Most Eurocentric scholars argue that "land reform" projects (restitution, redistribution and tenure reform) have produced more failures than success stories (PLAAS 2016). Such "land reform" projects neglect the fact that Africans are not per se demanding "land reform" but land restoration. Based on the studies on "land reform", we argue that in the context of such glaring failures of "land reform" projects, the pan-Africanist groupings in South Africa are fighting for the ownership and repossession of land that was stolen from Black people. The underlying objective of the pan-Africanist groupings' radical stance on land reform is to restore the dignity of Black people, as well as ownership of the mineral wealth of South Africa and not necessarily "land reform" per se. This is because colonialists illegally seized the land that belongs to Africans. Most importantly, Africans have never seen land as a private commodity that has to be sold in the market for monetary terms and land is too complex and multifaceted to be seen in technical and economic terms such as productivity, investment, property rights, contribution to economic growth and access (Mpofu 2017a: 3; Tafira and Ndlovu-Gatsheni 2017). Most importantly, the neo-liberal use of commercial agricultural production as a success criteria on "land reform", although important, is less important to pan-Africanists and insulting to Black communities because such land was "stolen" from Black communities by colonialists. Most scholars on decoloniality argue that land in

Africa, was fundamentally about belonging, and that land was communally owned and accessed through membership in a society and not to be commoditised for individual ownership. However, through a range of mechanisms of deceit, robbery and theft, the white settlers in post-colonial Africa have turned land to a mere capitalist means of production, that has to be privately owned, as well as to be bought and sold in the market (Mpfu 2017a:3; Tafira and Ndlovu-Gatsheni 2017). Besides belonging, land is also a materiality for the survival of its owners, as it was for Black people before white settlers stole it. Therefore, it would be more reasonable for white farmers to return the stolen land to the “rightful owners”. Indeed, control of land amounts to control of all other resources: this is also evidenced by mining multinational corporations that have looted resources in minerals-rich poor rural communities, thus leaving the rural Black communities in poverty (Hassan and Gqada 2017:3; Booii 2018).

To understand more fully the position of pan-Africanists and some Black South Africans, this chapter starts by explaining the struggling neo-colonial economy, high levels of unemployment, racially based inequalities and poverty. The next section then discusses “land reform” as a way of redressing wrongs of the past, and decolonising Africa. The next section then zooms into the bitterness of Black communities and land activists about the past, and the expropriation rhetoric. We then demonstrate the failures of most “land reform” projects and the failure of the state to redistribute land meaningfully because of the fear of a negative “investor” sentiment. The last section before the conclusion discusses land as a resource and how the neo-liberal rhetoric has tried to dissuade Black South Africans from pushing for an authentic and meaningful stance on land repossession.

The Struggling Neo-colonial Economy, Unemployment, Inequality and Poverty

In the context of the struggling neo-colonial economy, high unemployment rate, stubborn inequalities (in relation to race, gender and class), as well as poverty (Pillay and Everatt 2017), “land reform” has become of essence. “Land reform” has been presented as one of the tools for rural development, employment creation, increasing rural incomes, increasing agricultural production, eliminating overcrowding, reducing poverty and improving livelihoods (RSA, National Planning Commission, 2011; PLAAS 2016). For instance, through its National Development Plan of 2011, the ANC set out to create 300 000 Black farmers by 2030, while creating about 130 000 agricultural-based jobs and other goals to reduce poverty and improve livelihoods for poor people (RSA, National Planning Commission 2011:219-230). Unemployment,

inequality and poverty (especially amongst Black Africans and Coloureds) remain deeply entrenched in the South African society despite the redistributive fiscal policies and an extensive social safety net (Philip, Tsedu and Zwane 2014:85, 93). Studies on poverty show that more than half of South Africans are poor, which indicates the economic conditions, in a country where unemployment rate sits at 27, 7 percent and 36, 4 percent when using the expanded definition (Statistics South Africa 2017).

The presence of high levels of poverty and unemployment is also related to high levels of racialised inequalities and *a fortiori*, the presence of transnational plunder and theft in Africa. Recent statistics have shown that the income of an average white person is seven times greater than that of an average Black person, owing to the history of colonialism and apartheid (High Level Panel on The Assessment of Key Legislation and The Acceleration of Fundamental Change 2017:102-104). Thus, the unemployment, poverty and inequality statistics reveal that the legacy of colonialism and apartheid has hardly changed. With so much plunder, theft, looting, poverty, inequalities, unemployment and a struggling neo-colonial economy, “land reform” does not only provide hope for the return of the stolen land, but it has been presented as one of the solutions for poverty reduction. It also can provide economic freedom, as well as the reduction of inequalities and criminality related to transnational plunder and exploitation of African resources. It is therefore vital that land should be returned back to Black communities to avoid a massive conflict that threatens the peace which was born out of the transitional negotiations in South Africa (High Level Panel on The Assessment of Key Legislation and The Acceleration of Fundamental Change 2017:110-111). Describing the bitterness against colonialism and apartheid on the part of Black communities and the agitation for “land reform”, Atuahene (2014:6) correctly notes that: “*South Africa’s failure to rectify its land inequality is like a sea of oil waiting for a match*”.

Understanding “Land Reform”, Decolonisation, Pan-Africanism and Land Repossession in South Africa

South Africa’s history is laced with plunder, looting, theft and racism, since the arrival of Dutch settlers in 1652. Through a plethora of mechanisms, be it military, legislative and other forceful means, the Dutch and other white settlers maimed, killed, raped, robbed and forced-off indigenous communities from their lands, thereby benefitting from the wealth that belonged to Africans (Ntsholo 2016; Tafira and Ndlovu-Gatsheni 2017:10-11). Most importantly, land for Africans was not just about belonging, but it was the source and the asset for indigenous people [for livelihoods and wealth] who at the time lived relatively well-off through land-based livelihoods. Therefore, there is

overwhelming evidence that from 1652 to 1994, Black people became largely slaves and destitute in their own land after land dispossession in the development of the white capitalist society in South Africa (Nxesi 2015). Land was so important to the indigenous Africans so much that one of the reasons for enacting the Native Land Act of 1913 was that African peasant farmers out-competed white farmers and thus Black communities did not see any need to work for a white man. Thus, the Native Land Act and other successive pieces of racist legislation were meant to impoverish Black communities (and peasant farmers) and push them into destitution in “reserves”/Homelands to live as reserves of cheap labour for the development of white capitalist society. Through a range of coercive mechanisms Black people were forced to work as slaves in mines, towns and farms so that they could submit to the white capitalist system, leading to the proletarianisation and destruction of African production systems (Tafira and Ndlovu-Gatsheni 2017:12; Phiri 2017:74). Thus, when describing the infamous 1913 Native Land Act, Sol Plaatje, one of the leading ANC members at the time wrote: *‘Awakening on Friday morning, June 20, 1913, the South African native found himself not actually a slave but a pariah in the land of his birth’* (Plaatje 1982:21).

By 1994, 87 percent of the country’s land and wealth was in the hands of the white minority, while Black people were squeezed in homelands/“reserves”, occupying the remaining 13 percent (Walker 2012:811). Through its Reconstruction and Development Programme (RDP) and *White Paper on South African land Policy*, the ANC-led government envisaged many ambitious goals for “land reform”. “Land reform” in South Africa is implemented as part of a larger project of decolonisation meant to reverse the legacy, criminality and injustices of neo-colonialism, segregation, plunder, theft and apartheid (Kepe and Hall 2018). It also aims at improving the livelihoods of plundered and dispossessed poor people, reducing poverty, contributing to economic growth, rural development, providing security of tenure, creating jobs, reducing overcrowding in communal areas and improving reconciliation in general (ANC 1994; Department of Land Affairs (DLA) 1997; PLAAS 2016).

In the context of economic liberalisation policies that were imposed upon Africans by the Bretton Woods institutions, the South Africa government was coerced to adopt a markets-based “willing buyer, willing seller” approach when acquiring land for redistribution. This approach was adopted possibly to appease markets and “investors”, and prices of land have generally been close to market value that is controlled by white monopoly capital since 1994. As mentioned in the introduction, there are three programmes or types of “land reform”. The land redistribution is a “land reform” sub-programme that gives the Black majority an opportunity to apply for and get land. Under the land restitution programme, African communities who lost their land through the

successive plunder and theft by white racists are compelled by the South African Constitution to ask the state to beg the white farmers to return Africans' land in a claims-based manner. Under the land restitution programme, large groups of Black communities whose land was stolen through racially discriminatory mechanisms, since 1913, such as forced removals have a right to claim for their land or any other compensation, such as alternative land or cash compensation, and they have to provide proof that they own the land. Land tenure reform seeks to secure the tenure of people that live in areas where there is insecure tenure arrangements, such as in communal areas, former Coloureds rural "reserves" and private land owners (farmworkers, farm dwellers and labour tenants) (Cousins 2008:3; PLAAS 2016).

Most importantly, the state under the "land reform" programme becomes the willing buyer to buy land from white farmers and then redistribute it to Black communities. Even more insulting is that land beneficiaries are expected to enter into the so called strategic partnerships (white owned agro-based experts or multinationals) to access state funding through the Recapitalisation and Development Programme, also known as "Recap", a post-settlement support programme (Cousins 2016; Hall and Kepe 2017; Kepe and Hall 2018:133). In essence, the so-called strategic partners, although important, come in as experts who have to dictate to Black beneficiaries (who are the rightful owners of land) on how to manage their lands. In cases such as Agri-Parks or large-scale farms wherein beneficiaries cannot or choose not to resettle into farms, Black communities often go into these strategic partnerships to get dividends. However, research evidence by scholars shows that land beneficiaries largely do not have control over proceedings (their land and production), and they hardly benefit financially. This happens in the context where, because of huge failure rates of "land reform" programmes and infighting, the state is now hesitant to provide Black beneficiaries with full ownership and control, thereby preferring to keep production through joint ventures, while also favouring politically connected companies with politically connected Black Economic Empowerment (BEE) partners (Kepe and Hall 2018:133).

In the context of the pan Africanists' calls for decolonisation, this merely means that such arrangements are sham decolonisation that does not provide an opportunity for Africans to become their authentic selves to control their destiny. It also creates an impression that the state is a philanthropist that is doing a favour to Black communities, and yet historically land belongs to Black communities. South Africa is at a stage where decolonisation, restitution, restoration, compensation, pan-Africanism, struggles for land repossession, working class struggles, pro-poor struggles and other pan Africanist ideals are at the forefront. Decolonisation, which is related to pan-Africanism, has been a rallying cry for most South Africans who are interested in undoing the legacies

of the criminal and racist past (Mbembe 2016), in fact the criminality, racism, and plunder of African resources are still in existence (Bond 2006).

Although there are multiple definitions of decolonisation, decolonisation simply means the “end of the colony” and the dismantling of the criminal legacies and faces of colonialism and imperialism, which implies returning to what is authentically African (Jansen 2017:156-157; Eze, 2015:409) and the restoration of African resources and properties. The South African born-frees who are leaning towards pan-Africanism, socialism and decolonisation have shown an avid love for pan Africanism and decolonisation texts, as well as drawing inspiration from pro-Black figures such as Steve Biko, Robert Sobukwe, Marcus Garvey, Frantz Fanon, Thomas Sankara, Patrice Lumumba, Marxism and other Black Conscious Movement inspired writings. Pan-Africanists in South Africa want the dismantling of the resilience of the racist past, and most young born-frees who are pushing for decolonisation are not shy to argue that Nelson Mandela sold out on fundamental economic issues in the 1990s because the ANC largely focused on deracialisation (Tafira 2016), without meaningful restitution, restoration, and compensation for the robbed Africans. The #RhodesMustFall, #FeesMustFall protests, calls for name changes around South African institutions which pushed for the need to decolonise knowledge, institutions and the economy (Mbembe 2016; Kepe and Hall 2018), the working class struggles and calls for the return of “stolen” land are part of the larger project for decolonisation by pan-Africanist groups. Therefore, struggles for land repossession fit into the broader calls for the restoration of the dignity of Black communities and struggles for inclusion. There are more signs that most pan-Africanists and “land reform” activists are becoming impatient with the slow pace of “land reform” and are fed up with the neo-liberal excuses in returning the stolen land. The increasing land expropriation chorus is therefore a sign that most Black communities in South Africa, especially land activists and pan-Africanists are frustrated with ANC’s submission to Euro-American dictates of the white monopoly capitalists markets through their “willing buyer, willing seller approach”. Through the “willing buyer willing seller approach”, white farmers retain some prerogative powers to sell the land to the state for redistribution - this has slowed the pace of land repossessions (Zukowski 2017). Even if the white farmers do sell such farms, they are often given hefty amounts of compensation (M&G Reporters 2017; Hall 2018), paradoxically proceeding from the further exploitation of Black people that are supposed to be compensated.

It is important to emphasise that the majority of South African pan-Africanists groupings are pushing for the return of land to Black communities. This is not necessarily to say that there is a massive hunger for farming in South Africa, but much emphasis is on the fact that land was stolen and that it has to

go back to the Black people, who are the rightful owners. Studies on land hunger show that land hunger is largely prevalent in urban areas for housing (not for farming per se), as evidenced by increasing land invasions and massive evictions (protected by property rights). The increasing land invasions are often characterised by violent clashes between what the media calls “squatters” or illegal settlers and security forces (be it the police or anti-land invasion units from Municipalities) (Mpofu 2017a; Mpofu 2017b; Pithouse 2018). For instance, when one woman was interviewed in the context of a threat of eviction after she, together with a group of about 200 people, invaded a certain plot outside Cape Town, she said; *‘we are born here. Where can we go? We have nowhere...we don’t have jobs. We have nothing... (The ANC) promised to give us houses but it was empty promises’* (eNCA 2018).

These increasing illegal occupations (urban land activism), which are spearheaded by the pan-Africanist EFF, should also be understood in the context of rapid urbanisation in South Africa, wherein at least two thirds of the population is living in urban areas. This has led to an urbanisation crisis, or what other scholars call “urban land question”, that is characterised by a growth in unemployment, landlessness, homelessness, increasing poverty and inequality, which is caused by ANC’s failure to redistribute land in urban areas (Mpofu 2017a:6; Mpofu 2017b). The few land invasions recorded, although staged for political reasons by populist groupings, are a signal that some Black communities want land, although, this does not always imply land hunger for agricultural purposes (Mpofu 2017b).

Thus, land hunger arguments by pan-Africanist groupings are largely a rhetoric for land repossession, not necessarily for farming per se, but to restore the dignity of Black community, whose dignity was lost through land dispossession. Some scholars often try to persuasively argue that a big chunk of rural South Africans and land beneficiaries (especially restitution beneficiaries) are “de-culturalised” or “deagrarianised” from farming. Rather, they prefer to trek to cities and urban areas for jobs (Philip, Tsedu and Zwane 2014:27; Kane-Berman 2016; Mpofu 2017b: 103), partly because rural agriculture is not sufficiently supported by the state. The arguments of “de-culturalisation” on the land question are quite insulting to Black communities who are the rightful owners of land, and in fact such arguments of “de-culturalisation” are subtly used to deny restitution and restoration of land to indigenous communities. A study by the South African Institute of Race Relations (IRR), published in 2018 showed that a few Black people saw jobs and education as a better means of improving livelihoods, rather than “land reform” (IRR 2018). This study does not necessarily mean that most Black people do not see land occupied by white people as their ancestors’ land. This study simply shows that due to “deagrarianisation” largely because of colonialism and apartheid mechanisms

such as the creation of “reserves”, some Black people shun away from agricultural jobs, preferring urban economic opportunities.

Most Black communities largely want the return of their land that was stolen from their ancestors. A study by James Gibson found that 85 percent of Black people believed that land has to be returned to Black people no matter what the consequences, and that white people living on farms had no right to that land. Thus, Gibson’s study found that most Black people see land that is occupied by white people as stolen land (Gibson 2010 cited in Atuahene 2014).

Therefore, Black communities are demanding their land, which has been stolen, as is evidenced by the current outcry from pan-Africanists who are protesting against foreign ownership of land, increasing land grabs by multinational companies, foreign individuals and governments. For example, *in* 2014, Andile Mgxitama the former Member of Parliament for EFF, now the Leader of BLF wrote a letter to billionaire Richard Branson. This was after Mr Branson acquired a farm in Franschhoek and Mgxitama. He wrote the letter to inform Mr Branson that such land was stolen property (Mgxitama, 2014). Mgxitama’s letter was written in the context of massive multinational land grabs, in Africa, disguised as “investments” on land (Hall 2011; Mpofu 2017a; Tafira and Ndlovu-Gatsheni 2017; Mtapuri and Nhemachena 2017). This shows the evident fear by pan-Africanist South Africans that foreign white capital, disguised as investments, is invading the Global South.

Bitterness against the Racial Past, Land Activists and the Expropriation Rhetoric

The initial target of the ANC ruling government to redistribute 30 percent of farmland (or 24, 5 million hectares) by 1999 (which was later adjusted to 2014) has failed. In 2012, about 7, 5 percent (or 7, 95 million hectares) had been redistributed through land restitution and land redistribution “land reform” sub-programmes (Cousins 2013:12). Thus, while the ANC government has made some notable achievements in correcting the legacy of apartheid on “land reform”, the racist legacy of apartheid, in the form of racially skewed ownership patterns remains skewed in favor of the white minority group, which still owns a vast amount of commercial lands (Akinola 2017). A 2017 land audit conducted by the Department of Rural Development and Land Reform (DRDLR) shows that White South Africans own 72 percent of the total farm and agricultural land, followed by Coloureds who own 15 percent, while Indians own 5 percent. Black South Africans own only 4 percent, while others in different categories own 4 percent (Land Audit Report, 2017:02). Referring to racially based land ownership patterns, an activist from the Social Justice Coalition was quoted saying; *‘During apartheid, we knew that if you were Black and Coloured, you were poor and*

landless. Twenty-four years into democracy, we know that if you are Black and Coloured, you are poor and landless' (eNCA 2018).

Thus, while there are poor Whites in South Africa White prosperity and Black poverty have hardly changed. Therefore, many South African pan-Africanists and Black South African communities continue to see the land occupation by White farmers as an abomination of neo-colonisation, White supremacy, oppression and conquest of Black communities (Cousins 2016:12). This is because land dispossession was at the core of colonial robbery and theft, as well as when Black people fought against colonialism; the return of land was at the forefront (Kepe and Hall 2018:131). In an article titled, “*This land is our land*”, one of South Africa’s land experts Professor Lungisile Ntsebeza decried that the “willing buyer, willing seller,” policy on “land reform” has largely failed to reverse the hundreds of years of land dispossession that was started by European colonisation. The ANC’s new radical stance on “land reform” remains rhetorical (Ntsebeza 2018).

The bitterness of Black South Africans, land activists and pan-Africanists has been worsened by the arrogance of White farmers who have resisted returning the land to Black communities. Such bitterness has been exacerbated by the cowardice of the ANC-led government that has failed to provide meaningful and radical redistribution of land through the markets-based approach because the state is scared of annoying the descendants of colonial robbers, some of whom often disguise themselves as “investors”. Many South African pan-Africanists are often noted arguing that the South African Constitution, especially the property protection clause has been a hindrance to a faster and meaningful land repossession, and thus Section 25 of the Constitution has to be deleted and amended (Makinana 2015). Studies on “land reform” have revealed that the ANC-led government has not fully used their expropriation powers enshrined in Section 25 of the Constitution because the ANC fears the neo-colonial robbers who disguise themselves as “investors”. Indeed, the High Level Panel on The Assessment of Key Legislation and The Acceleration of Fundamental Change, published in 2017 revealed that what has been lacking on “land reform” is a strong political will to implement “land reform”, as well as corruption and maladministration, and not the Constitution per se. For instance, there is evidence that the state is sitting on about 4000 farms that they have not redistributed to Black communities because of bureaucratic incompetence and infighting of communities (George and Eybers 2017). In a classic case of fearing white monopoly capital markets, in the Mala Mala restitution case, the government opted to pay R1billion compensation (wiping out one third of the national budget), rather than using the courts to determine the amount of compensation that was “fair and equitable”. This was despite the fact that the Mala Mala case was in the Constitutional Court for the

Court to determine and provide precedence for the payment of a “fair and equitable” compensation before the then Minister Mr Gugile Nkwinti pulled out the case, and yet the government continues to throw a radical rhetoric on land (Hall 2018).

There is also an overblown talk of genocide against white farmers by criminal elements that seek to obviate the imperatives of restitution/restoration and compensation, including foreign governments who deliberately ignore the fact that far more Black people die as a result of on-farm violence than do White people. White people’s groups such as AfriForum have been misleading the world with their claims that there is a genocide against White farmers in South Africa. Therefore, even the Australian government promised to fast-track the Visas for White South Africans in case they lost the land that they stole from Africans (Hlatshaneni 2018). Speaking to 702 Radio, a well-respected South African radio station, Johan Burger, an independent policing expert, said that although there is not enough accurate data available on farm killings, there are indications that more Black farm workers have been killed than White farmers (702 Radio podcast 2017). Thus, the White genocide myth is a scare tactic by racist elements in South Africa and abroad, to block Black communities from getting back their land.

Failures to Restore the Land Back to Africans

Judging by the impact of “land reform” projects on beneficiaries and the slow nature of land repossession, the “land reform” programme is argued to have failed. Restitution and restoration projects face more opposition for stakes than does redistribution projects. Restitution projects are worsened by the fact that restitution is a rights-based land reform sub-programme wherein people who have different interests, resources, assets, skills, come together on the land they (or their ancestors) once owned, leading to inevitable conflictual relationship on how to run their projects (PLAAS 2016:40). Numerous case studies on “land reform” projects (redistribution and restitution) on land use, production and livelihoods and institutional arrangements reveal that the majority of projects are not operational after “land reform”. The main reasons for failure often include lack of sufficient post-settlement support (PSS), limited funds for infrastructure and production (Xaba and Roodt 2016). This is due partly to the underfunding of the “land reform” departments because the Treasury has consistently given a mere 0,4 percent of their budget to “land reform” departments (High Level Panel on The Assessment of Key Legislation and The Acceleration of Fundamental Change 2017).

Other reasons for failure include poor decision-making and management on the part of beneficiaries because of lack of prior experience in agriculture and

poor financial management skills. Due to these failures, and limited beneficiary participation, many beneficiaries have lost interest in “land reform” projects (PLAAS 2016:27). Another reason that has been presented as a cause of failure is group dynamics wherein large groups of beneficiaries are expected to manage large-scale farms. Institutional frameworks in the form of strategic partners such as trusts, and CPAs have received poor support, leading to poor results. Importantly, studies also show that in cases where there is some activity or relative success on “land reform” projects, such projects have led to limited benefits for “land reform” beneficiaries (PLAAS 2016:27; Cousins 2016). A few studies, notably by Chitonge and Ntsebeza (2012) and Ncapayi (2013) have shown some positive and promising results of land redistribution projects, although such projects faced group-dynamics challenges.

Whose Land is it anyway? Understanding Land as a Resource and the Anti-land Repossession Rhetoric in South Africa

According to Ntsholo (2016), since the arrival of White settlers in 1652, White settlers have not only dispossessed, maimed and killed Black people, but they continue to possess benefits from the land, at the expense of Black people who are the rightful owners of land. Although the ANC-led government has become more radical/populist on land, owing to the pressure from EFF and other pan-Africanist elements, Kepe and Hall (2018:130) correctly argue that the ANC has been “defending the interests of white (and corporate) landowners. In the process, the ANC has failed to listen to the legitimate demands of many of its constituents for more decisive action to redistribute the wealth of the country”. History has shown that land is wealth and thus access and control of land guarantees access to wealth and productive resources (Cousins 2008:3), and hence most pan-Africanists are angry at the slow pace of the ANC-led government to fast-track redistribution of land.

There exists a rhetoric which is backed by some criminal racists elements that have described the push for “expropriation without compensation” and land repossession as “land grabs” (Corrigan 2018), a very insulting act, that seeks to demonise the return of land to the rightful owners. Responding to the argument that Black people who occupy land are stealing or grabbing land (someone else’s property), the leader of EFF, Julius Malema then responded; *‘that is madness, how does taking my car that you stole from me become theft?, you steal my car, I come and take it back, you call that theft? That is insane. We are not stealing anything, we are taking what is rightfully ours’* (TRT World 2018).

Such is the language of a leader who is serious about decolonisation. Essentially, Malema was reminding the journalist that Black Africans are the rightful owners of land, and the return of land to Black people should not come

with excuses, because land was unlawfully and violently seized from Black communities. Part of the argument for decolonisation is that Africans should move out of the shackles of mental enslavement that cause Africans to feel inferior and submissive to whiteness, while allowing White settlers to tell them what to do with their resources (Sithole 2014). Decolonisation should make it possible for Africans to return to their authentic and original selves (Eze 2015: 409).

Further, Kepe and Hall (2018) correctly argue that the current South African “land reform” (redistribution and restitution projects) reproduce colonial patterns through their perception that commercial agriculture is a preserve of Whites. There is some evidence that the state is scared of providing full ownership (titled deeds) to African beneficiaries because the state wants to be assured that farms under “land reform” (redistribution and restitution projects) will be “productive”. There are even reports that the government wants to confiscate “unproductive” “land reform” farms (redistribution and restitution projects) to give them to those who can use them “productively” (Mail and Guardian Staff Reporter 2010). While we are not against full agricultural production, such a narrow focus of “land reform” (redistribution and restitution projects), denies other meanings of land, such as identity, home, family, heritage and source of livelihood (Kepe and Hall 2018:134-135). Therefore, Tafira and Ndlovu-Gatsheni (2017:10) add by correctly arguing that the land question is multifaceted and complex to be reduced to economic terms such as commercial productivity, “investment”, property rights, contribution to economic growth and access. The emphasis on production, which implies commercial agriculture, and the threats of repossession of land from African beneficiaries also ignores the goals and abilities of Black communities, who are often not given enough support and is at odds with the goals of decolonisation (Kepe and Hall 2018:133). Tafira and Ndlovu-Gatsheni (2017:22) argue that the emphasis on commercial production and food security which seeks to deny Black people access to their ancestors’ land is misleading because millions still go hungry when they are landless and even when there is an abundance of food, the powerful and the dominant forces ensure that food does not reach the poor. Emphasising commercial production, privatisation and commoditisation of land also ignores the fact that land in Africa has always been fundamentally about sustaining the livelihoods of Black people, and that Black people have other meanings of lands, such as belonging wherein one accessed land through membership in a society (Mpofu, 2017:3). Thus, Ndlovu-Gatsheni, (2013:11), a critical scholar on decoloniality warns us that: *‘What Africans must be vigilant against is the trap of ending up normalising and universalising coloniality as a natural state of the world. It must be unmasked, resisted and destroyed because it produced a world order that can only be sustained through a combination of violence, deceit, hypocrisy and lies’.*

Therefore, Tafira and Ndlovu-Gatsheni (2017:9) correctly argue that: *‘Any redistribution programme must factor in African indigenous epistemologies, the question of being and ontology, worldview and other cultural indications’*.

Additionally, some Eurocentric observers have argued that farming is hard, risky and uncertain work (Corrigan 2018). While this is true, the irony is that there is evidence that some White farmers are holding on to the land properties that were stolen from Africans, because it is their source of livelihoods. White farmers also stand to gain from compensation from the government (Hall and Kepe 2017:6), and so they hold on to the stolen land. Some transnational criminal elements dissuade South African Black pan-Africanists from pushing for land repossession. Additionally, “land reforms” have been considered a failure. To redress the failures, there is need to fix some technical issues attendant to the land reform.

Another scare tactic by transnational racists, criminals and neo-liberal elements is to use the condemnations of Zimbabwean land repossessions that happened in the early 2000s to dissuade pan-Africanists from engaging in similar radical approaches to land issues. However, those who exploit such failures often forget or deliberately ignore the 1979 Lancaster House Agreement that bound the postindependence Zimbabwean government to a ten-year moratorium on compulsory acquisition of land. In the Lancaster House Agreement, Britain promised to provide funds for the land redistribution. Thus, while the White people wanted such a moratorium, the African liberation war leaders wanted land restitution and restoration to begin immediately after independence (McGreal 2002; Sibanda 2015).

While Nmoma (2008) and Johnson (2015) argue that by 1997, political developments had changed in the United Kingdom (UK), the then sitting Tony Blair’s government was in terms of international law still bound by the Lancaster House Agreement. Although in terms of international law, the predecessor administrations bind successor governments, Tony Blair’s British government reneged on the Lancaster House Agreement to fund the land redistribution programmes in Zimbabwe. Tony Blair from the Labour Party had become the UK Prime Minister and he dishonoured the Lancaster House Agreement. Tony Blair used the pretext of human rights abuses and lack of democracy in Zimbabwe: therefore, he also pushed for regime change. Robert Mugabe then realised that he had long been dealing with dangerous western hypocrites who were not interested in the return of land to Black communities. Thus, a radical land repossession programme ensued in Zimbabwe, and the Western neo-liberals, (who are the former colonisers) hit Zimbabwe with illegal sanctions that ruined the Zimbabwean economy. This meant that the Zimbabwean government could not fully fund the post-settlement support programme after land repossessions. Of course, Robert Mugabe is not a saint, he probably took

advantage of UK's betrayal and hijacked the movement by war veterans to repossess the land, because he realised that he was losing power. While we do not seek to exonerate Robert Mugabe's Zimbabwe leadership, we argue that the British, Americans and other Europeans were the biggest contributors to the failure of land repossession in Zimbabwe. Therefore, the failure of land repossession programme in Zimbabwe should not be used to dissuade South African pan-Africanists from pushing for land repossessions.

The "investments" and property rhetoric are also being used as a scare tactic to frustrate pan-Africanists. In South Africa, the Banking Association has warned that "expropriation without compensation" will trigger a further downgrade, low demand for property and loss of confidence in the banking sector (Phakathi 2018). While this may be true, the core of decolonisation is to question who is throwing such rhetoric? The question is why must Africans be instructed on how to get back what rightfully belongs to them? Why must they be instructed about how to talk and think about their land (wealth, resources) (Sithole 2014). The point here is that South African pan Africanists must reject these neo-liberal pretexts that are meant to forestall the restitution of land.

We have also noted the avaricious nature of multinationals in South African rural minerals-rich communities, wherein large-scale mining operations have worsened the plight of dispossessed and impoverished poor rural communities. While the extractive industries have contributed significantly to economic development of the neo-colonial economy in South Africa, minerals-rich rural communities are at the mercy of avaricious mining multinationals that leave them without any real benefits. In 2017, a research done by Open Society Foundation for South Africa reveals that rural communities have been rejecting these multinational mining companies because of the avaricious looting nature of these companies, including "ecological degradation, air and water pollution, a decimation of cultural heritage, impact on agricultural production, resource looting, physical displacement and land loss" (Hassan and Gqada 2017:3). These communities which have been living on top of these massive wealth, are often left in the dark when lucrative "deals" are made with traditional leaders, who often violate customary law by presenting themselves as the sole representatives of communities. Mining companies are complicit in such dodgy activities. There is evidence that there is secrecy in such "deals". This has led to anger from communities that feel excluded from their minerals-rich lands when their land is grabbed by the transnational corporations and other international criminals that are dispossessing African peasants (The High Level Panel on The Assessment of Key Legislation and The Acceleration of Fundamental Change (2017:264-266; 502-505). This explains why in most minerals-rich communal lands, there are often tensions between traditional authorities and community members (Booi 2018). This demonstrates that mining multinationals have found

their way into the lands that sustain African communities and they rob and steal from poor rural communities.

Conclusion

It is clear that most South Africans, especially radical/ pan-Africanists believe that all land belongs to Black South Africans, and that land should be returned to Black people, who are the rightful owners, no matter what consequences. Land was at the core of colonisation that included land dispossession, and therefore, land repossession is seen by radicals/pan-Africanists, as the core of decolonisation and the restoration of the dignity of Black people. Most importantly, land is also related to access to the country's wealth, and therefore, the redistribution of land to Black communities is seen as the redistribution of the country's wealth to the rightful owners (Black communities). "Land reform" in South Africa has been clouded by a neo-liberal rhetoric (excuses) and economic terms wherein imperatives of commercial agricultural productivity have been used as criteria for success and as a means to dissuade pan-Africanists, by defusing more radical and meaningful redistribution of land. There is also a sickening use of private property language by neo-liberals and international criminal movements (including foreign governments) and the argument that a radical land restoration would scare away "investors". Thus, neo-liberals often favour the need for "growing" the economy and "promoting job creation" (Phiri 2017:71). The private property rights language and the "investors" rhetoric spurred on by international criminal elements and neo-liberals, is entrenched in African societies when the falsified and brutal history of White settlers, who did not respect the property rights of indigenous, people is documented at the expense of true African history. It is no wonder that the killing of indigenous Black people by White settlers (Tafira and Ndlovu-Gatsheni 2017) epitomised the genesis of private property in South Africa. Even the ANC government has succumbed to such neo-liberal rhetoric as evidenced by their markets-based approach to land, their fear to use state powers to adequately realise their expropriation powers in Section 25 of the Constitution, their threat to confiscate unproductive "land reform" farms and their rhetorical radical stance of land repossession to appease frustrated African voters. Fortunately, pan-Africanist groupings have managed to see through the neo-liberal thinking on land and have rejected any use of racially-tinged discourses on commercial agricultural production as a criterion of success. Although the ANC government spurs a populist/radical stance on land, the government has been scared of giving title deeds to African land beneficiaries. There are also reports that the South African government is also sitting on thousands of farms that they have failed to redistribute to Black communities.

The South African government has also failed to provide PSS that is sufficient, systematic and consistent because of the underfunding of the “land reform” departments and yet they continue to throw a populist rhetoric. Therefore, we argue that pan-Africanist groupings are much more concerned with the return of stolen land, and not necessarily “land reform” *per se*.

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Displacements in Colonial Zimbabwe: Contestations, Meanings, Consequences and Some Lessons

Oliver Mtapuri & Everisto Benyera

Introduction

Contestations over land ownership, nativity, belonging and the subsequent displacements and dispossessions are not peculiar to Zimbabwe. They have a long nauseating history in the formerly colonised world, including Africa and Zimbabwe. For Africans, human movement within the continent never constituted a crime as it was part of their livelihoods. With colonialism, this form of human movement was not only curtailed but controlled and at worst criminalised. Laws, constitutions, boundaries, identity cards, passports and other colonial power structures were enacted to perform two tasks: formalise land displacements and dispossessions while simultaneously bestowing the stolen land to the colonisers and their newly created structures.

In this chapter we explore the displacements suffered by Zimbabweans in colonial British Rhodesia not only as a physical process of moving families and communities from point A to point B but as a process of epistemological, linguistic, cultural, jurisprudential and ontological displacement. A European epistemology was imposed as part of the colonial project which displaced the centuries old African epistemology which is yet to be rediscovered and inaugurated. By linguistic displacement and dispossession, we mean the way in which African languages and ways of communication were marginalised and substituted by mainly English which till this day is Zimbabwe's main language of government, business and education. English language gained so much ontological density that the ability to proficiently speak the language is viewed as a mark of smartness and intelligence. African languages such as ChiShona, IsiNdebele, ChiChewa, ChiVenda and XiTshonga are becoming marginal languages in their home country. We argue that, equally, the colonising European/Western culture has become the dominant global culture and in the absence of cultural loyalty, certain Zimbabwean cultures have been displaced. Regarding jurisprudential displacement and dispossession, our claim is that colonialism in Zimbabwe replaced indigenous legal systems and ways of conceptualising right and wrong, perpetratorship and offendership and injustice. The forced imposition of the Roman Dutch law, we argue, amounts to the

displacement and replacement of local legal systems which resulted in the current misalignment between the people of Zimbabwe, the land and the laws used to normalise human relations. Finally, by ontological displacement and disposition, we are referring to the removal of local hierarchies of knowledge, power and respect, among other attributes and their replacement with an imposed colonial order instituted by white males acting on behalf of the English Queen, followed by white females, their pets in between, then black males and finally black females at the bottom of the ontological ladder. This colonial ontological ladder places the White men closer to God and the Black women closer to animals. This was a clear displacement of African religions, their relationship with God, spirit mediums and other related beings. The totality of these disposessions and displacements amounted to theft of Africans' *beinghood*. After they were disposed of their being, Africans in colonial Zimbabwe became subjected to all forms of violence meted on them by the colonial systems and subsequently after being internalised by the locals, started to be meted on Blacks by other Blacks. Such is the mutative nature of displacement, disposessions and the violence which ensures and actualises them.

This chapter is organised into four main sections. In the first section we conceptualise the notion of displacement. In the second section we turn our attention to the historicisation of displacements in colonial Zimbabwe. In the third section we ascribe meanings of land dispossession and displacements by showing their relevance to the lived experience of Zimbabweans.

Conceptualising Displacement

The notion of displacement, in our view is highly contested as much focus is given on human displacement at the direct expense of other displacements suffered in the form of theft of Africa's minerals, water, tress to the extent that residents of African cities such as Windhoek have to buy water from a German-French consortium which includes The Berlin Water Company. Human displacement and the concomitant enslavement are part of the larger capitalist project of commodification, commercialisation and putting profits ahead of all else. Capitalism and colonialism have never placed focus on [African] human beings – they have always preferred African resources including water, fauna and flora.

Human displacements are not always necessarily by force. There are other subtle forms and means of effecting displacements such as indoctrinating people and using ideology as a basis for changing people's views and hence their decisions. *Prima facie*, people appear to be willingly moving from one geographical space to another, yet prior to their movement, a lot of ideological indoctrination would have been done by those in authority in order to

manufacture this false consent. Political socialisation in conjunction with misrepresentation especially in favour of the dominant political elites is also used as part of the manufacturing of consent in order to effect displacements. Officially, the most applied conceptualisation of displacements is that by the United Nations Education and Scientific Organisation (UNESCO) (2017) which described displacement in reference to migration studies as a situation where people are forced to move away from their locality or environment and occupational activities.

Reading from Antonio Gramsci and Pierre Bourdieu, mechanisms such as power, authority, manufactured consent and deliberate falsehoods are also used to create deception for purposes of displacement. In his notion of hegemony, Gramsci argued that consent should not be taken as always consensual as there are cases where consent is manufactured and or coerced (Gramsci 1971). Gramsci's 'political society' is equivalent to the colonialist as ruled though direct force and effected through the use or the threat of force. Below the 'political society' was the 'civil society' (different from today's civil society) which according to Gramsci ruled through consent manufactured from elite cultures, ideas and beliefs using the media, universities and religious institutions. This 'civil society' manufactures consent and legitimacy which when deployed appears as if citizens are in agreement with the move to displace them. For Gramsci there is a lot of power constituted in the realm of ideas and knowledge which is expressed through consent rather than force (Gramsci 2006). In other words, instead of using force to effect and manage displacements, the colonialists used manufactured consent to augment force. For Bourdieu, misrecognition and deception play an important function in displacement. Here displacements occur through subtle ways such as coaxing and deceiving people using, *inter alia*, education to reproduce dominant cultures and power relations (Bourdieu 1982; Bourdieu & Passeron 1977). The constant antagonism, exchanges and interplay between the agency and the structure gives rise to 'habitus' wherein behaviour and thinking is guided, in the process manufacturing consent for displacements (Bourdieu 1977).

In relation to humans, displacement is a form of social change that results from a multiplicity of factors which include political factors, armed conflicts and other forms of violence and human rights abuses, infrastructural development projects and natural disasters such as volcanic eruptions, famine, cyclones and floods. Shamsuddota *et al* (2012) define displacement as a particular form of migration which results from individuals being forced from their homelands to settle in 'foreign' places, against their will. Although as alluded to above, displacements also happen due to manufactured consent, falsifications, deceit, propaganda, ideological deployment and political socialisation. There are two main types of displacement namely direct or primary and indirect or secondary

displacement. Direct displacement is that which is planned and is as a result of movement that is meant to pave way for some infrastructural developments. Indirect displacements are those which occur as people escape from life threatening situations like natural disasters; floods, famine, earthquakes, wars/violence and so on. Displacement can also be internal or external. Internal displacement refers to those movements that are confined within the national boundaries of one country while external entails crossing national boundaries. Krieger and Meierrieks (2016) view displacements as expulsion of a people from their homelands as they are forced to settle in other areas. We define colonial displacement as displacement for purposes of pillage, theft and plunder. It is mostly involuntary and involves brutality, deception, fear, humiliation and territorial takeover/conquest.

Forced displacements on the African continent can be traced back to as early as the slave trade. The violent and ruthless nature of the raids during which the slaves-to-be were captured resulted in many Africans fleeing to faraway places - away from the slave trade route as noted by Lovejoy (2000). Such displacements can never be voluntary. They were thus forced to unwillingly abandon their ancestral homelands (Ojo 2015) to settle in 'foreign' lands where they were regarded as 'aliens'. In present day South Africa, early Dutch settlers were also blamed for terrorising the Khoisan people through a series of raids that were initially meant to weaken the Khoisan, and followed by ruthless confiscation of their livestock, harvests and minerals. This was followed by the enslavement of the local people. The Dutch settlers then grew ambitious and ventured into commercial farming. To acquire land for this purpose, they thus resorted to stealing land that was owned by the local people, waging violent wars against them using savage weapons (Asafa, 2015; Ocheni and Nwankwo 2012). This resulted in massive displacements as the local people were dislodged from their fertile and well-watered soils of the Western Cape to hot dry infertile areas of the present day Eastern Cape and the North West provinces (Thompson 2011). Asafa (2014) gives the example of how violence was unleashed onto the Zulus and the Xhosas after they attempted to resist dispossession and displacement. So intense were the displacements that by as early as 1925, about 90 per cent of present day South Africa was owned and controlled by the settlers, leaving a mere 10 per cent to local populations who were actually the real owners of the land (Nunn 2007). Verpoorten (2009) argues that as a result of European settlement on their land, the natives lost their land, homes, families and livestock as they were destroyed and annexed. The locals were vanquished, overpowered and set on a trajectory of destitution and extinction. Contemporary vocabulary talks about empowerment. The ruthlessness meted on locals represents disempowerment. If destitution lasted centuries, equally the processes of re-empowering should be prolonged, enduring and must begin.

Disempowerment was an injustice based on the quantum and quality of the things lost – potentially irrecoverable if restitution is not realised in the present generation.

In the context of push and pull factors, the settlers were escaping the inhospitable and hostile climate and paucity of resources from the countries they were coming from. The abundance of resources – land and minerals - in Africa represented the pull factors. Blakeley (2009) also emphasises that once they identified land which they saw fit for their purpose, European settlers in Africa would move in to occupy it regardless of what the owners think. Where they faced resistance, they resorted to using various forms of coercion, dispossession and displacing the owners, driving them to barren and less lucrative places with little potential for carrying out successful economic activities. European settlers thus gained ownership and control of large territories of land that previously belonged to Black Africans, by means of displacements. This theft and robbery of wealth was regularised through the promulgation of laws that conferred the loot on settlers. White *et al* (2012) also add that the colonial period saw Europeans stealing large tracts of land which were originally held under customary tenure. The land was even sold to new settlers as the European population increased and the demand for land rose, and this was a major blow to the dispossessed populations who were hopeful to regain their land someday. Black Africans were pushed to stay in overcrowded areas characterised by poor soils, prone to natural disasters such as famine, droughts, floods and usually disease infested - where they were also forced to pay tax for occupying land that belonged to them. This is tantamount to hijacking and corruption. How can one steal and still be entitled to levy a forced tax? In other words, how can a robber steal, and still have the temerity and hutzpah to impose a tax on the victim. Such actions represent a panoply of deceit and treachery. For a conspicuous context, the next section focuses on the displacements in Zimbabwe.

Historicising Colonial Displacements in Zimbabwe

The failure to get minerals in large quantities as was anticipated by the White settler regime in Mashonaland in the 1890s led some into farming and this saw the increase in demand for fertile land for agriculture by the White farmers under the British South Africa Company (BSAC) (Mlambo and Phimister 2006). What later came were wholesale land grabs of African owned land as Africans were stripped of their rights to land ownership (Nyandoro 2012). This led to massive displacements of indigenous Africans as they were pushed to hot dry and tsetse-plus-malaria infested areas which were less suitable neither for human settlement nor productive farming - later to be known as Tribal Trust Lands or

Native Reserves (Mlambo and Phimister, 2006). Many indigenous Africans still live in those same areas.

White settlers took advantage of the Land Apportionment Act of 1930 enacted by the colonial administration to expropriate land and venture into commercial farming. Few as they were, they were allocated over half of the total Rhodesian land (Nyagumbo 1982) and by 1935 they held 35 million acres, ten million more than the 25 million which were set for native reserves or native purchase (Mlambo 1972). Settlers concentrated their settlements in highly fertile soiled areas of high rainfall and around such urban centres like Salisbury, Victoria, Gwelo and Melsetter (Mlambo 1972). The Shona and Ndebele were thus further forcibly driven to areas of poor soils and little rains (so-called Native Reserves) to pave way for White commercial farms. Half of them were forced to pay rent for settling in these 'reserves' while the remainder were forced to labour on White farms which had swallowed their ancestral lands, rearing livestock, planting tobacco, corn, sugar, cotton and so forth (Frontani and Davis 2008). Some settlers even returned to Europe, but still continued to profit from Zimbabwean expropriated land by collecting rent through local agents (Mlambo 1972; Cocks 1999). White thieves, as they are characterised by Jack Goody (Goody 2009) and their descendants maintained the umbilical cord to Europe through which they still siphon resources to this day.

The White colonial robbers used a number of misinformed narratives to justify their land grabbing and the consequent displacement of native populations. They gave the false impression that invading the land and kicking away the native owners was part of their wider objective of bringing civilisation to the uncivilised parts of the world through improvements in modern methods of agriculture, latest modes of transport, standard housing as well as education (Frontani and Davis 2008). The reasoning was that the invasions were necessary to improve and 'tame' the wild, dangerous and diseased Africans. Boggie (1954 in Frontani and Davis 2008) wrote that while the settlers struggled to turn the wilderness into farms, they managed to introduce electricity, roads, railways among other 'symbols of modernity'. They also argued that the White settlers' invasions of African land was responsible for transforming Rhodesia's wild, uninhabitable, virgin bushes into habitable, productive and arable land by bringing 'modern' farming techniques (Fuller 2004; Lessing 1995). This narrative conceals the almost free (slave) labour of Africans that was used to build the roads, the houses, the railways and bridges and lay the foundations of the infrastructure that exists to this day. The numbers that died during the construction of this infrastructure will never be known.

The White robbers also rode on the falsehoods that Rhodesia was an almost uninhabited land as there were large tracts of unutilised and empty land, describing it as "a country abandoned to emptiness" (Boggie 1954 in Frontani

and Davis 2008). Lessing (1995 in Frontani and Davis 2008) argued that Rhodesia was home to a very small population - only 250,000 native Africans occupying a land that is as big in size as Spain. Frontani and Davis (2008) also quote Cocks (1997) describing Mudzi Tribal Trust land as a vast piece of land but meagrely populated area while the present day Gonarezhou National Park had absolutely nothing apart from wild trees. Wylie (2002) weighed in to describe the northern parts of Rhodesia as 'pure wilderness' whereas Godwin (1996) regarded the eastern mountains as barren. Such narratives of relatively empty lands which the native Africans had failed to 'develop' gave the impression that the land which settlers' occupied did not belong to anyone and hence their takeover before finally 'civilising and putting it to good use,' justifies the land grabs and displacements. If one removes the context – the indigenous people who were living there – the land becomes empty and 'free for all'. Where in the world can one overpower someone, and even kill and occupy their land and call it civilisation. What civilisation? Where is the civility in this kind of civilisation?

British settlers in their bid to take over and control the land and the resources that were in the hands of indigenous people also made use of fraudulent treaties and concessions. They claimed to have entered into a number of agreements with traditional chiefs and kings. Such treaties include the Rudd Concession (1888) and the Lippert Treaty (1889) signed between the whites and King Lobengula. These were later used to trick the local indigenous people into giving away ownership of their land and minerals and paving the way for massive and callous displacements. The Lippert Concession was used as justification for the occupation of most of the Mashonaland areas in 1890, by granting the settlers the right to take over land rights from the indigenous people. BSAC settlers used this treaty to unfairly parcel large pieces of land to themselves, most of which was under direct and immediate use of indigenous peoples of the pre-colonial era. The treaty was thus used as the justification for land expropriation without compensation and accorded Rhodes the rights over land between the Zambezi and Limpopo. However, these agreements are said to have been entered with and signed by local chiefs and kings who were illiterate in English. Falola (2002) dismisses the credibility of these so-called agreements, arguing that there is no evidence that local leaders understood the contents of these agreements because they could not read and write in English, let alone understand the English language in which these concessions were written. In the end, the whole thing about agreements, concessions and treaties thus turned out to be nothing but trickery (Asafa 2014; Falola 2002). There is no evidence of the translated versions of the agreements and concessions of the time clearly showing the debauched motives of the authors of these agreements. In today's world, some of these agreements would not stand the test of the law.

Another common method used to displace indigenous Africans was the use of some pieces of legislation which heavily worked to their advantage and oppressed the locals. Oppression and repression were part of the technologies used to displace indigenous Africans. Nyandoro (2012) notes how the Land Apportionment Act (LAA) of 1930/31 ‘stirred up antagonism and conflict because of the displacement and dispossession it engendered,’ further noting that it rescinded the rights of indigenous Africans to land ownership across the country as a whole. He (Nyandoro) cited black farmers who relied on Munyati River for water and irrigation in the Gokwe-Sanyati area were deprived of their customary rights to land and water and thus impacting on their farming. The LAA was the main legal tool that gave birth to racial land segregation, which in turn effected Europeans economic dominance over Black poverty by confining the natives to separate non-productive areas (Kwashirai 2006). The only compensation that they got was being granted some exclusive rights to procure land in regions that were called the Native Purchase Areas (NPAs) or were driven to native reserves. Mupfuvi (2014) and Thompson (2004) further note that in 1930, an estimated African population of close to 1.2 million people got 30 per cent while just about 50,000 European settlers were awarded 51 per cent of land in Zimbabwe by LAA. It is important to note that both arrangements, that is, the NPAs and Native Reserves involved displacing people from their original homelands, stripping them of their rivers and forests on which their lives depended. From both justices - political and moral – the inequities enacted by LAA were politically and morally indefensible. The LAA enacted and ordained fraud.

Other than the LAA, the colonial administration also introduced the Native Land Husbandry Act (NLHA) around the 1950/51. This legislation promoted further land grabbing and forced migration (displacement). It entailed moving away Africans who stayed close to Europeans-owned land so as to create some ‘white enclaves’ where no Africans could bother them by any means: poaching, stealing, encroaching, or trespassing (Nyandoro 2012). Through legislated thievery, the rightful owners were considered poachers, thieves, encroachers and trespassers in their own land. Land acquisitions and the consequent displacements reached a record high around 1969 after the passing of the Land Tenure Act, which was an extension of the LAA and NAHA. This legislation together with earlier injustices fuelled the ‘*Second Chimurenga*’ war which had started earlier in 1966 never to stop until 1979 leading to the attainment of independence in 1980 (Nyandoro 2012). It is for the land that forebears fought and died defending the land in the ‘*First Chimurenga*’. It is land that foregrounded the inequities of colonial rule and became the strongest impetus for waging the war of liberation. It is not by chance that calls to reclaim and repossess land reverberated in the Chimurenga songs.

Other than the use of such controversial laws, European settlers also unleashed untold violence as a way of driving local populations away from their land. We view violence as a technology of dispossession and displacement. As noted by Thompson (2011) earlier, they would take advantage of their superior and advanced weapons of war to raid and overpower the locals before dispossessing them of their resources and pushing them to faraway places empty-handed. Other than pushing them intentionally for the purpose of White settlement, the Rhodesian Front unleashed violence indiscriminately during the *Chimurenga War*. At times after attacks by the guerrillas, they would respond by terrorising the civilians, accusing them of feeding, clothing and sheltering the guerrillas. As a result, where violence became unbearable, some were forced to flee their homes and seek refuge in safer destinations while others went all the way across national borders to settle in neighbouring countries. This explains why refugee camps like Chimoio and Nyadzonja in Mozambique were home to thousands of displaced Zimbabwean refugees. Frontani and Davis (2008) also noted how the settler armed forces also used poisons in destroying crops, livestock, homes and contaminating water sources, restricting movement and gatherings by imposing curfews, all of which led locals to feeling insecure and thus resorted to fleeing from their land. They also planted landmines in areas where locals used to stay, restricted movement and this endangered local communities such that farming, grazing, hunting among other socio-economic activities were threatened and indirectly forcing some to move to safer areas (Wylie 2002; Cocks 1999). Some of these places are still inhabitable implying that the real owners were permanently displaced and never had an opportunity to come back. Their fortunes were forcibly reversed – from their riches, in their own terms - to destitution, at the machination of someone else. The next section examines what it means to lose land and be dispossessed in an African context.

The Meanings of Land Dispossession and Displacements

In Africa, owning and custodianship over a piece of land comes with a number of meanings such that losing it and being displaced can be interpreted in a variety of ways. These are discussed in this section.

Displacement as Loss of Land, Livelihoods, Mining and Farming Rights

Blacks lost a lot of fertile land when they were displaced by the White farmers who were backed by the BSAC. In the process of these dispossessions, Blacks also lost their right to ownership of prime agricultural land and water - resources which constituted the most important assets which were critical in constructing their livelihoods (Nyandoro 2012). Krieger and Meierrieks (2016)

also concur that displacements were actually forced migrations and expulsions from the land that traditionally had been and is theirs. This presented negative effects on their traditional forms of livelihoods by creating crude land-rights markets which totally disregarded [traditional] African land rights. Munro (2013) notes that land dispossessions and displacements resulted in legal, political, cultural, and institutional transformations which facilitated the changing of traditional societies into capitalistic ones where communally or customarily owned land was privatised or commercialised and land ownership rights were bestowed on individuals at the expense of local communities. This type of transformation was divisive by fragmenting and dismembering communities to the extent of losing their identities through calculated disarticulation. This is in line with the infamous doctrine of *divide and rule*. Obeng-Odoom (2015) points out that Karl Marx noted that the processes of displacements were based not on smooth or rational basis but were based on application of force where peasants were dispossessed of their land and barred from accessing it and thus systematically pushing them to join the new working class which was heavily under-remunerated. This also led to the creation of impoverished displaced local communities who were vulnerable to labour exploitation as the new land owners hired them to perform casual jobs on their farms in return for very meagre wages (Robertson and Pinsturp-Andersen 2010; Feldman and Geisler 2012). Rodney (1972:165) aptly captured this scenario by noting that:

When the colonial government seized native lands in Zimbabwe they achieved two things simultaneously. They satisfied their own citizens who wanted mining concessions and farming land and they created conditions whereby landless natives had to work not just to pay taxes but also to survive.

Mupfuvi (2014) also noted that once they had settled in the reserves, the African ambition and potential to prosper were cut since the only options available for them were to resort to subsistence farming on less productive soils or to labour in settler-owned land for very low remuneration. Those Africans who occupied land that was identified for use by Europeans after the *Chimurenga* war moved into organised expulsions and destocking programmes which forced them to go into wage employment where salaries, living and working conditions were much degraded (Arrighi 1983 in Mupfuvi 2014). Entrepreneurship among indigenous people was, therefore, stifled through the introduction of slave labour in farms. This created conditions for the production and reproduction of poverty among indigenous peoples resulting from a process of dispossession to slavery. van Onselen in Nyandoro (2012: 305) also noted that this dispossession of their land culminated in ‘a great deal of desperation on the part of people who were trying to eke out a living.’ As noted by Thompson (2011)

and Blakeley (2009), Africans lost land that was fertile which was under good climatic conditions and they were dumped in areas where farming was near-impossible. Nyandoro (2012) notes that working in overcrowded Native Reserves where the conditions were bad for farming was a challenge to an extent that displacement equated to lost livelihoods. Moyo and Yeros (2005a) also note that because of the peasantisation of Zimbabwe's rural economy, land is an economic asset without which life becomes unbearable. Mupfuvi (2014) sees it as an asset of production, which Chavunduka and Bromley (2012) observe that when mixed with labour, it becomes productive and supports life. The LAA and related pieces of legislation resulted in land shortages among Africans and the rapid deterioration of African agriculture and in turn reduced the agricultural economy of the local populations to subsistence levels, cutting the variety of crops that they cultivated and this also negatively affected their once flourishing trade. The reserves were also overcrowded and overstocked as human and livestock population outweighed their carrying capacities (Tshuma 1998; Rennie 1978 and Loney 1975 in Mupfuvi 2014). As a result of overcrowding, overstocking and land shortages, destructive farming methods were adopted and this further led to deterioration of the soils and compounded the fate of Africans. This also concurs with World Rainforest Movement (2004) which argues that removal of the forest cover plays an active role in promoting soil erosion and drying up water sources among other environmental harms. Prior to the coming in of European settlers, Africans did their cultivation on plots large enough to yield sufficient produces for their needs using hand labour and this did not promote soil erosion (Mupfuvi, 2014). African practices of cropping and livestock rearing which were steeped in indigenous knowledges were destroyed and vanquished. It is also pertinent to realise that Africans also lost their livestock; cattle, goats, sheep, chicken during these forced movements, an observation also made by Thompson (2011) in relation to the Dutch settlers in the Western Cape Province in South Africa. The same applies to those who fled violence and slavery. There was no way that people running for their lives could ever be able to escape with livestock. Even if they did, the livestock was miniscule. Under the circumstances, self-preservation and life were important. Vambe (1972) and Bakare (1993) in Frontani and Davis (2008) also emphasised how the Shona people were engaged in mining and trading of such metals as gold, copper, and silver. However once the white minority settlers moved in, they were dislocated from mineral rich locations, stripping them not only their land but mineral rights and rights to free trade and in so doing, rendering them poor. Akabzaa (2009) notes that annexing of vast lands belonging to local populations and the displacements that followed deprived people of their right to their livelihoods. Besides the deprivation of the right to a livelihood, the people lost their right to their birth right – the land.

Indigenous Africans were even forced to pay a wide range of taxes - hut, dog, cattle and poll taxes even after being settled in unproductive land and these constrained their already compromised livelihoods (Birmingham 2008; Nunn 2008; 2007). Poverty thus became a reality among Africans since they had lost their means of production, and this pushed some household heads to further travel in search of greener pastures in their quest to improve the welfare of their families and to meet the many taxes that they were forced to pay. Some ended up going as far as present day Johannesburg (popularly known as Wenela in Zimbabwe). This impacted the family and its fabric as it meant separation of members - husbands and wives, fathers and children as well as children and grandparents. For some, these were never meant to be their desired destinations as they succumbed to sicknesses and wild animals along the way and lost their lives. Some arrived, got jobs but never made it back home to their families, but married and started new families there. As if it was not enough, members of the same clan or who shared the same kinship were at times settled in different areas and this effectively led to massive family/clan disintegration. Gaps developed between families, eventually leading to the death of the kinship. Today, it is common to hear Zimbabweans indicating that some members of their family are settled in distant places and most of the current generation do not know each other, signalling that their family has effectively fallen apart and members in different destinations are now strangers to each other. According to Bakare, (1993: 47 in Frontani and Davies 2008), land in the African context is regarded as the “repository of family ties between the living...and those not yet born” Displacements thus have far reaching implications which go beyond economic matters.

Displacement as Loss of Identity, History and Belonging

According to Utete *et al* (2003), writing in relation to the Zimbabwean land redistribution, land defines the being of individuals and sovereignty of nations. In Zimbabwe, this view popularised such phrases like “*mwana wewhu*” (children of the soil). Land ownership is thus regarded as a birth right. Land is seen as belonging to the ancestors and thus a heritage that is supposed to be passed on from one generation of the clan to another (Chavunduka and Bromley 2012). Mupfuvi (2014) and Bruce (2008) argue that the fact that at birth, one’s umbilical cord is buried into the ground cements the birth right notion while the fact that the ancestors’ graves remain forever in that land means that it is the obligation of their descendants to have duties and obligations of taking care of these graves and protecting their legacy including defending the land and its sovereignty. Tomaselli and Mhlanga (2012) discovered that land forms a causal link between a people’s nativity and history, citing how the San are of the belief that their lives

are incomplete if they are not given back their land and other resources. Frontani and Davies (2008) also found that in an African context, the loss of land is equated to loss of history and identity. Land is therefore regarded as a home and shelter in the Zimbabwean context and in Africa at large. It is in the land that minerals are buried. It is the land that produces the food that people eat. It is land that gives an identity.

It is therefore important to note that land dispossession and the displacements that follow are tantamount to losing one's birth right where they lose connectivity with the place in which they were born and where their umbilical cord was buried. Put simply, once displaced from their place of birth, one becomes 'homeless' and even if they have found a new place, they are still regarded as 'aliens' and thus sovereignty and all forms of freedom are lost. People are identified by where they come from and once one moves away from their birthplace, they lose their identity. Displacement also amounts to losing one's connectivity with one's history and ancestors. It thus becomes difficult to remotely honour or pay tribute to one's ancestors when one is not in touch with their place of burial. Leaving the ancestors' graves behind equates to abandoning them since it is their obligation to look after the burial sites (Mupfuvi 2014), something that Mwandayi (2011) emphasises was regarded as a taboo, and whenever it happened, it was done for culturally acceptable reasons because of the link the Shona people place between land/soil and the ancestors.

Displacement as Permanent Disempowerment and Enslavement

Dispossessions and displacements amounted to loss of power and jurisdiction to those who were in authority. For traditional leaders, they were supposed to have land over which they had authority. There were also supposed to be people, normally of one social group or other related ones upon whom he/she was supposed to preside. Now with no land and associated resources - forests, mountains and rivers as well as people to govern, one would cease to be a chief. Some were even driven into other areas which already had their traditional leaders meaning that there were reduced to subordinates or ordinary people. Nyandoro (2012) noted how Chief Wozhele of Gokwe lost jurisdiction of his people after being moved from his Rhodesdale area (the area between Gweru, Kwekwe, Chegutu, Chivhu, Mvuma and Gutu) and moved to present day Gokwe-Sanyati area which was well known for its unfavourable temperatures, poor sandy soils and for being infested with tsetse flies. From being a chief of such a rich area like Rhodesdale to be dumped in such a place of poor climatic and ecological conditions was indeed a demotion. Although he retained his chieftainship, the amount of wealth in the form of resources that a king presides over determined how powerful he was and so what was done to

Chief Wozhele signified loss of power. It was even worse if we are to consider that he could not exercise his full authority due to interference by the colonial administration such that his power, authority and influence were heavily compromised. Supporting this observation, Kriger (1992 in Nyandoro 2012: 324) note that traditional chiefs lost control of the land and this 'loss of the right to allocate land outraged them' as they were rendered less powerful. Mupfuvi (2014) also cited how a grandfather to George Nyandoro (a 2nd Chimurenga Liberation hero) was stripped off his chieftainship after he joined nationalists in fighting colonial rule. Although they were recognised to some extent by the colonial administrations, local traditional leaders had their influence and independence cut as they received orders from the administrators (Obikili 2013). Indigenous people were humiliated, and so were their Chiefs with equal measure. The Chief's authority dissipated.

The natives were pushed into the protected villages/reserves as a way of controlling them and this had implications on their freedom. It was easy to monitor them in confined and designated villages. It became easier to prohibit them from making huge gatherings no matter how important the event was to them. For example, they were not allowed to gather in groups of more than five people (Frontani and Davis 2008) and this deprived them of the right to associate with friends and relatives, to come together to discuss important family issues or celebrate dates that were important in the history of the family clan or the community at large. Such gathering required them to seek approval from the District Administrator (DA) - failure to get it meant that they could not go ahead. Their movements were also under constant surveillance as the colonial administration would want to know where they were going and the reason behind their trip. They were also beaten, detained or even shot at for being wrongly accused of stealing or illegal trespassing whenever they were found close to white settlers' homes. They could not enjoy the same rights which they enjoyed before displacements, particularly with respect to free movement. They were prisoners in their own land.

Displacement as Loss of Cultural Heritage and Indigenous 'Knowledges'

Frontani and Davis (2008) also note that forced displacements contributed a great deal of damage to the Shona people's material culture and identity. This ushers in the notion of birth right and death right as noted earlier by Mupfuvi (2014) in which a lot of cultural significance is placed on land. The good rains that they received, the consequent bumper harvests, rich grazing pastures, perennial rivers and the successful hunting expeditions were attributed to the ancestors of their land whom they would often thank for providing them with the rich soils (Bakare, 1993 in Frontani and Davies, 2008). Chimonyo *et al* (2014)

also weigh in by noting that in incidences of dispossession and displacements, local communities were forced off their ancestral lands and resettled elsewhere in places which do not carry any cultural/spiritual significance to them. They had their places where they would go to perform rain-making ceremonies during times of droughts, or appease their spirits during times of misfortunes like untimely deaths or sickness of family or clan members. Similarly, before embarking on long journeys especially going through the jungle, they would first consult the ancestors or spirits of that land, perform the necessary cultural rites, sought guidance and protection along their way after which they would embark on their mission. This is adequately captured by Vambe (1972: 91) in Frontani and Davis (2008: 60) who notes that it was believed to be the duty of the ancestors and the spirits of the land to 'safeguard the security and well-being of the living as well as guarantee the integrity of the national homeland' while spirit mediums played the role of seeking ancestral guidance during wars. The Zimbabwe Women Writers (2000: 9) also reports that in the Traditional Shona culture the Shona people believe that 'ancestors play a big role in guiding people out of the valley of death'. Kanyongo (2005) also notes how Christian missionaries and the church were used in preaching the gospel that pacified the indigenous people, teaching them not to seek revenge or fight back. The Church was thus used to advance European cultural hegemony in Africa at the expense of local traditions (Segueda 2015; Shizha 2005a). Pacification was a technology that was used to disable and disarm the indigenous people to be less combative and be subservient. This subservience facilitated slavery and colonisation.

It is also important to note that the indigenous people had very good knowledge of their environment. They were quite familiar with nature and its surroundings such that they knew the various types of vegetation and animals from which they would draw indigenous medicines and herbs used to cure various diseases, wounds, snake or insect bites (Muzorewa quoted in Frontani and Davis 2008; World Rainforest Movement 2004; Awudi 2002). What did loss of land and displacements that followed mean to the indigenous people? Frontani and Davis (2008) observe that land was regarded as a sacred resource among the Shona people, such that losing it was tantamount to losing spiritual strength. Vambe (1972 in Frontani and Davis 2008) also notes that it was believed among the Shona people that ancestral spirits played a part in influencing farming conditions, rain, drought, and the health of cattle. It is thus important to note forcing these people to move away from their homelands did not only deprive them of their land and mineral rights or their birth rights but also their rich cultural and spiritual heritage. It disconnected them with their ancestors and the guiding spirits, since these could not be forced to move as well. They had to leave behind their sacred places, including those where they used to consult their ancestors and spirits and where they used to perform rain-

making ceremonies. They were forced to move to the native reserves in places that they were not familiar with, and whose ancestors and spirits were not theirs. Therefore, they could not consult them and at the same time were divorced from their own spirits. It became difficult to continue performing rain partitioning ceremonies when they were in 'foreign' lands whose customs they were not familiar with. Different ecological zones have different types of vegetation and this implied that all their knowledge of different traditional medicines became decidedly less useful. They had to start anew to find the local herbs which they could use for medication. Krieger and Meierrieks (2016) also contend that displacements resulted in loss of indigenous farming knowledge that were suited for their land of origin and were thus forced to explore new ones which suit the land of their destination.

Taberer (1905: 317) quoted in Mupfuvi (2014: 139) noted that 'many different kinds of crops are grown and natives know exactly the best soil for a particular crop', further emphasising that even some colonial agents acknowledged that the Africans were gifted with excellent judgemental knowledge which they used to decide in which type of soils to grow which type of crops. This wealth of knowledge was however lost with displacements. In short, displacements led to loss of cultural heritage and traditional *knowledges* (Muzorewa in Frontani and Davis 2008). Settlers actually sought to demonise the African *knowledges* and replace them with western ways of knowing (read: western ways of producing ignorance on the continent) (Ocheni and Nwankwo 2012), in the process portraying indigenous *knowledges* and cultures as barbaric and uncivilised (Shizha 2006b; Davies 2004). This process is called agnotology and refers to the process of producing ignorance on the continent (Proctor 2008). Westerners have produced a lot of ignorance on the continent of Africa and what is worse, they justified the unjustifiable such as colonialism (Gilley 2017). Ocheni and Nwankwo (2012) also argue that in pre-colonial Africa, Africans were involved in a wide range of economic trades - mining, sculpting, moulding, curving, weaving, etc. using their own indigenous technologies and *knowledges*, but were forced to abandon them as they were displaced. Trades and vocations were disrupted in bad ways. Learning and re-learning new trades and skills; tooling and re-tooling are not easy in circumstances of fear, being on the run, intimidation, dispossession and displacement.

Fitzpatrick (2012) emphasise how slavery and internal displacements distorted African indigenous languages and African naming practices noting that especially those African names which carry spiritual reverence. Annexed land and reserves were renamed in English for the convenience of the colonialists as villages, rivers, forests, mountains had their traditional names revoked. Local languages were also distorted as people of different local languages were in some cases dumped in one area. It is also important to note that colonial

displacements were also in total disregard of the Declaration of Principles on the Rights of Indigenous People's Numeral 4 (cited in Warden- Fernandez 2001: 2) which recommends that 'Indigenous Nations and Peoples are entitled to the permanent enjoyment of their Torres Straits ancestral historical territories' which may include land, water, forests and non-renewable resources, as well as the economies that are based on these resources. However, colonial dispossessions and displacements did not respect such crucial aspects such that the indigenous communities and peoples were 'least regarded and have historically been neglected in policy and other discussions relating to many development issues' pertaining to their own land and resources. The Centre of Research and Development (2014) also emphasises that after their land was taken, nearby communities were subjected to constant harassment, accused of committing petty crimes like trespassing and encroaching, as this was common during colonial dispossessions and displacement.

Conclusion

In short, land dispossessions and the consequent displacements during the colonial era impacted the indigenous people in every aspect of their life - socially, economically, politically and culturally. It led to loss of livelihoods, economic resources and activities, the breakdown of family ties, loss of cultural/spiritual connectivity with the ancestors and land spirits, birth rights, loss of power, sovereignty, freedom and all forms of rights. It is after realising all these losses and the inequality that emerged as a result, that the indigenous people waged a war against the colonial government. Beginning in the 1960s, they began to organise themselves by attacking the White settlers until it grew into a fully-fledged conflict that was later to be known as the *Chimurenga War* which only came to end as the Rhodesians gave in and settled for peaceful resolutions giving birth to Zimbabwe's independence in 1980. However, colonial land distribution continued to shape land ownership in the post-colonial Zimbabwe as most of the land remained in the hands of the few Whites. It has been noted that after independence, just around 5,600 Whites controlled up to 15.5 million hectares while as many as 780,000 Black smallholder farmers owned just 16.4 million hectares of land (Mnangagwa, 2009). These anomalies thus necessitated land redistribution which Zimbabwe rolled out since 1999. Led by the war veterans and ZANU (PF) youth, the process was marred by chaos and violence but it managed to address the historical-colonial theft of land and creation of inequalities. The process appeared chaotic and violent because it was heavily opposed by the descendants of colonisers who had vested interests in the neo-colonial status quo.

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Agriculture and Africa's Development Agenda

Peter Mukarumbwa, Simbarashe Tatsvareai & Clifton Makate

Introduction

Questions have been asked concerning the emergence of new agricultural development powers in South-South Cooperation (SSC) whether it serves African needs or rather it is a disguised new form of imperialism. The role of China, Brazil and India in fostering new development cooperation in Africa has challenged the dominance of Western countries. The northern development aid has been accused of perpetuating the legacies of colonialism through imposing conditionalities emanating from unequal international relations. However, other scholars view SSC as a new form of imperialism meant to loot resources from the African continent. Nonetheless, this debate is inconclusive as some researchers argue that Foreign Direct Investments (FDI) by developed country “investors” actively contribute to host country food security by increasing the land used for crop production in the host. Conversely, FDI by “investors” from developed countries hamper host country food security by decreasing cropland in Africa. This is explained in terms of environmental and technological spillovers emanating from the foreign “investor” country’s institutional context. International agencies, donors and agribusinesses in Africa have been accused of failing to create platforms for a more reflexive debate on sustainable agriculture or equitable development, nor do they promote forms of rural mobilisation for more participatory development. Thus, global agribusinesses in Africa continue to reflect the dominant trends in contemporary agricultural development that promote market penetration, capital accumulation and the integration of smallholders into existing forms of market accumulation. The widespread agreement that poverty reduction is closely related to agricultural growth in most developing countries warrants that a further investigation be undertaken on agriculture and Africa’s development agenda as it currently stands. This critical analysis sought to explore the current debates on agriculture and its link to African development. The drive for development, especially as projected by outside forces has often been viewed with scepticism, as other nations and contents seek to have a competitive edge in exploiting Africa’s resources and opportunities. The study recommends that the paradox of the mismatch between population growth and per capita income growth in Africa

can be reduced by adopting strategies which focus on increased agricultural “investment”.

Conceited global efforts have been made to try and alleviate food insecurity in various countries in Africa South of the Sahara. Despite these efforts food poverty continues to be a major developmental challenge affecting huge numbers of people in Africa South of the Sahara (World Bank 2008). This scenario raises questions about the current modalities which are being implemented to try and improve agricultural development in Africa. This puts into question the issue of whose agenda the so called global efforts, being initiated to try and advance agricultural development in Africa, are serving?

Africa is encountered with mixed fortunes in terms of attaining sustainable agricultural development. This is because the continent is deemed to be one of the fastest growing economies globally (Ojo & Oluwatayo 2016). Furthermore, Africa has conducive weather and vast tracks of land favourable for agricultural production. Despite these opportunities the continent is characterised with one of the highest rates of poverty, malnutrition and inequality globally (World Bank, 2018). From the foregoing, Africa is sometimes described as a land of “superlatives” (Ojo & Oluwatayo 2016)

The fact that smallholder farmers in Africa undertake the bulk of food production (AGRA 2014), reinforces the notion that Africa has potential to advance its own agricultural development agenda with minimal or even no external assistance from the western countries. For example, smallholder farmers account for an estimated 80% of total number of farms in Africa South of the Sahara and they produce about 80% of food supply in Africa (AGRA 2014). However, the low agricultural productivity in Africa South of the Sahara which equates to less than US\$1 per day, is one of the key factors fuelling rural poverty in the continent (Rosen & Shapouri 2012). For that reason, Africa South of the Sahara has one of the highest proportion of poverty and undernutrition compared to any region in the world which stood at 53% and 30% respectively as of 2010 (AGRA 2014).

Having been relegated to the backstage of African development agendas for a long period of time, food security and agriculture are now being given priority particularly from the donor community (Bourne & Joel 2014). Bourne & Joel (2014) concur with Moseley *et al* (2015: 1) who noted that Africa is often referred to as the “last frontier of agricultural development.” Africa is regarded as a continent of vast untapped agricultural potential, a region where the last remnants of global hunger needs to be demolished and an area with capitalists agricultural expansion potential (Moseley *et al* 2015). The above situation reignites the need to critically examine the agricultural technocratic and neo-liberal agenda and hunger alleviation in Africa. Thus, African agriculture is often viewed as disjointed from the global economy and is locally oriented creating a

major problem. Those in support of this view such as Horta (2009) concur that the current agricultural model is retarding development in the continent by depriving Africa an opportunity into the global economy, increasing the prevalence of hunger and poverty in the continent. The solution to this dilemma is thought to be a “New Green Revolution for Africa,” where use of fertilisers, pesticides and hybrid seeds are used to increase crop productivity (Moseley *et al* 2015: 1). Supporters of this model advocate for public private partnerships which are spearheaded by donors to enhance penetration of private sector to link African farmers to agro-dealers, agro-processors and retailers (Hartmann, 2012). Generally, the private sector is in support of this paradigm. However, authors such as Moseley *et al* (2015) complicate this debate on agricultural development agenda in Africa by offering divergent views. Initial research by Moseley *et al* (2015) revealed that the extent to which New Green Revolution for Africa and the proliferation of supermarkets in African cities will improve household food security for the poor. Moreover, in Gambia, for example, Bornstein (2015) showed that smallholder farmers quickly embrace improved seeds varieties of New Rice for Africa. Conversely in Ghana, Nyantakyi-Frimpong & Bezner Kerr (2015) stated that high external input agriculture is not suitable to prevailing political economy and ecology of production and undermines smallholder farmers decision making in their day to day challenges. Similarly, to try and advance the African agricultural development agenda and push for the “New Green Revolution for Africa” foreign entities have participated in land grabs which worsen the tribulations of the dispossessed Africans. Moseley *et al* (2015), remained sceptical about such kind of strategies in enhancing agricultural productivity in the African continent, hence, the renewed technocratic and neo-liberal emphasis to advance agriculture and Africa’s development agenda.

Philanthrocapitalism in African agriculture entails that outsiders dictate agricultural production systems on the African continent to serve their own interests. A case in point is drawn from Southern Africa where White settlers, through land grabs, price subsidies and infrastructure, advanced their own production interests at the expense of indigenous production systems such as sorghum and millet (Thompson 2014). Philanthrocapitalism in African agriculture perpetuates the view that African production systems are inferior compared to those of the Americans and Europeans. In that view, African smallholder farmers are referred to as “subsistence farmers” and concerted efforts are made to try and link them to global food value chains by multilateral corporations. This is used as a yardstick for measuring success in African agriculture so that they do not just focus on local market production. To that end, linking African local agricultural food production to the global market is

deemed as serving multinational companies corporate boardroom objectives at the expense of Africans.

The rise of South-South Cooperation (SSC) in advancing agricultural development in Africa has been questioned as to whether it is bringing a new dimension to development which resonates with African needs or rather it's a new form of imperialism (Amanor & Chichava 2016). Hence, it is not only the Euro-American capital and corporations that reignited the issue of (re-) colonization in trying to advance development on the African continent. SSC has been viewed as a new form of imperialism meant to continue looting resources from the African continent to satisfy demands of fast expanding industries and consumer needs of rising powers such as China and Brazil. Conversely, proponents of SSC maintain that it is based on mutual respect, third world solidarity and horizontal exchange (Alden *et al* 2010; Golub 2013). It is assumed that SSC demystifies conventional northern development aid of setting conditionalities, perpetuating the legacies of colonialism which was based on unequal power relations. From the foregoing, the debate whether SSC is resulting in new initiatives for African development that alleviate poverty or rather it is perpetuating capitalist accumulation as well as competition on the African continent similar to conventional northern aid is inconclusive. Despite this gap, African countries are cautioned to guard against remaining as passive beneficiaries of SSC agenda as well as old partners of northern hegemony which drive capital accumulation and cement unequal international relations. This results in failure by African countries to influence their own development policies, hence unfavourable outcomes which do not alleviate poverty on the continent. Nhemachena *et al* (2017) contend that Africans are being dispossessed of their valuable land and other precious natural resources and in the process left in abject poverty while their masters in the global north are enjoying a luxurious life on earth. In response to the 2007-2008 global financial crisis "investors" from the global north in search for financial returns started looking for land across the world particularly in Africa. Large scale "investments" have been targeted in mining, agriculture, biofuel production, and conservation related uses (Scoones 2018). In most cases, the ordinary people have been displaced with their livelihoods totally disturbed. For instance, the Ethiopian government displaced more than 500,000 in order to allow foreign "investors" to use land efficiently (Thomson 2014). Also in Ghana, chiefs approved the lease of thousands of hectares of land for biofuel production projects despite existing landholdings (Boamah 2014; Hausermann *et al* 2018).

Those that support neo-liberal solutions argued that the world economic crisis manifested as a result of inappropriate national policies, distortion of the economy by the state interference, poor governance and government

involvement in production (Amanor & Chichava 2016). Thus, as more and more developing countries seek assistance from the International Monetary Fund (IMF), conditionalities of structural reforms were imposed on them. These reforms badly hurt many African economies and up to date they are still nursing the wounds of those economic structural reforms.

In analysing the engagements of Brazil and China in agricultural sectors of Ghana and Mozambique, Amanor & Chichava (2016) revealed that their involvement is presented under the rhetoric of SSC but their ultimate goal is to secure long term “investments” which serve their domestic economies as well as agribusiness accumulation. Thus, Chinese and Brazilian involvement as an example of SSC in African agriculture is driven by ulterior motives to control agricultural markets, gain access to land and to some extent to influence the political context of these African countries. Therefore, the interventions of SSC in African agricultural sector even though they promise joint benefits and mutual learning, are premised on the same level with other donors, international agencies and agribusiness. These kinds of interventions rarely result in equitable development or sustainable agriculture nor do they create participatory rural development in African countries. Rather they propagate the agricultural development discourses [of the global north] that promote capital accumulation, market penetration and integration of smallholder farmers into global value chains. Despite these assertions, it is noted that currently literature which is based on empirical evidence on the motivation and impact of SSC in African agriculture is scanty (Abdenur & da Fonseca 2013; Fingerhann 2015; Mcewan & Mawdsley 2012). An in-depth analysis of the global north donors and SSC on receipt countries is yet to be unpacked.

There is consensus that the global landscape has changed in the past decade between North-South in trying to exert neo-liberalism on Africa in the name of “development”. Mawdsley (2017) critically examined the rise of the South in development hegemonies and concluded that poor countries will remain trapped in the extraction of their resources which extraction is very unprofitable in advancing their development agendas. There is agreement that neo-liberalism has just been expanded to include the rising southern powers of Brazil, India and China amongst others. To support this argument, a case in point is the More Food International (MFI) which was shown by Cabral *et al* (2016) that it did not travel easily from Brazil across space and socio-political realities to receipt African countries. Analysing three African countries Zimbabwe, Ghana and Mozambique Cabral *et al* (2016) found that African countries adopt family farming and MFI differently from Brazil’s domestic political struggles leading to divergent views on Brazil’s intended agricultural development agenda. Thus far, authors such as Wolford & Nehring (2015), have argued that the term SSC has been misused to describe countries that fall within the same latitudinal

coordinates but fail to differentiate their economic, political and economic status.

These experiences evidently show that simplistic narratives on debates about SSC potential to transform African agriculture no longer work. Rather what is required is a more nuanced approach to arguments as well as challenging framing of current SSC as a “best fit” channel for transforming development experiences in Africa. A more adaptive learning is required if African agriculture is to benefit substantially from SSC. Cognisance should be given that SSC draw many similarities from the development programmes of the global north. Hence, it needs to be constantly reviewed, drawing lessons from past experiences and understanding that SSC is also informed by struggle for position and control of African resources in a contested process. Accordingly, potential of SSC in fulfilling support to African agriculture can only be realised if genuine platforms for learning are opened up and embraced instead of seeking to deny the hidden agenda of SSC.

The debate as to who is the better devil in advancing agriculture and development in Africa rages on unabated. Santangelo (2018: 75) brings a new dimension to this debate that:

Foreign Direct Investment (FDI) in land in agriculture in developing countries, a phenomenon also known as land grabbing, on host country food security, and suggest a differential impact depending on the investor’s country of origin. FDI in land by developed-country investors positively influence food security by expanding land used for crop production because of home institutional pressure for human rights respect and responsible farmland conduct, in addition to positive spillovers. Instead, FDI in land by developing-country investors negatively influence food security by decreasing cropland due to home institutional pressure to align to national interests and government policy objectives, in addition to negative spillovers.

Clearly then, structural transformation that is most likely to reap dividends for Africa’s agricultural sector is one that emphasises value addition to Africa’s primary agricultural products and one that endeavours to transform Africa’s agricultural sector into modern high productive sector. For this to be attained it requires renewed commitment from African governments, private sector and international development community to devote resources to agriculture. From the foregoing, it is recommended that more coordinated efforts among key stakeholders are required in planning and implementation of Africa’s agricultural development agenda. Execution of these plans must be guided by the heterogeneous nature of African economies; consequently, specific country

needs must be considered in advancing development and agricultural agenda on the continent from all interested stakeholders.

Is Africa’s Dependence on Agriculture the Cause of Poverty in the Continent?

Agriculture Driving Economic Growth

Africa South of the Sahara has a population of about 1.16 billion and more than 60% are rural based, with agriculture being the dominant economic activity (World Bank 2018). Agriculture contributes more than 32% of the continent’s gross domestic product (GDP), implying the dominance of the sector in income generation and livelihoods (Chandy 2015). Livelihoods from this sector accounts for about 66%, while the budgets for the poor also have almost the same proportion as food costs (World Bank 2018). It is apparent from these statistics that agriculture plays a very important role in the lives of African people and the major driver of both economic and social wellbeing. Over the last 20 years, the continent has experienced strong economic growth, with an average of 5.2% annually (Veras 2017). This implies a relatively strong agricultural growth. Figure 1 shows the growth rate in both GDP and GDP per capita.

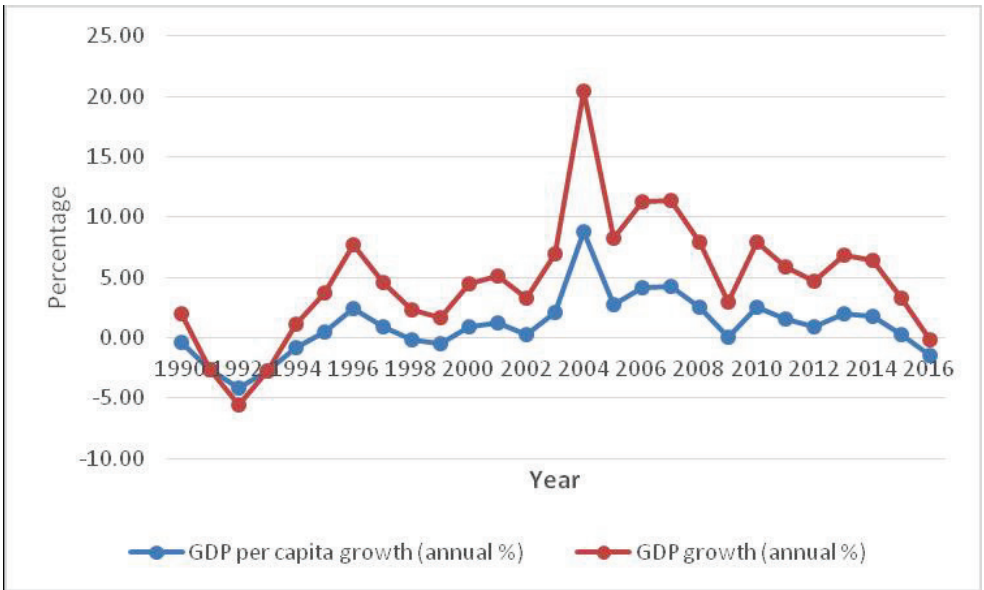


Figure 1: Annual and per capita GDP growth (World Bank 2018)

The figure shows a twinning trend between GDP growth and GDP per capita, which is expected given the closeness of the two measures. It also shows

that growth was strongest in 2004 but is showing a slowing trajectory since then (World Bank 2018).

During the same period, Africa's population living in abject poverty (below \$1.90 a day) has risen from 354 million in 1996 to 403 million in 2013 (World Bank 2018). Figure 2 and 3 shows proportion and actual number of people living in poverty.

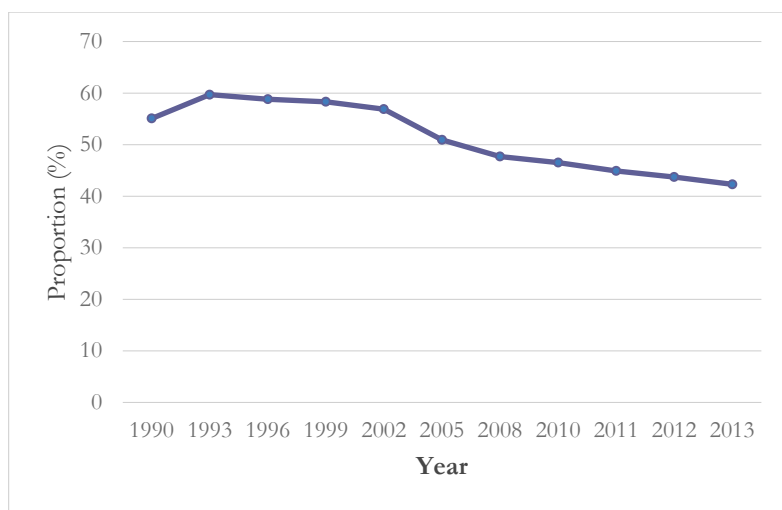


Figure 2: Poverty gap at \$1.90 a day (2011 PPP) (%) (World Bank 2018)

Figure 2 shows that there is a relatively small reduction in the proportion of people in sub-Saharan Africa living in poverty. This proportion has been above 50% from 1990 to year 2005 (World Bank 2018). From the later year onwards, this percentage has been reducing to nearly 40% in 2013 (World Bank 2018). However, figure 3 shows that the actual population in poverty is increasing.

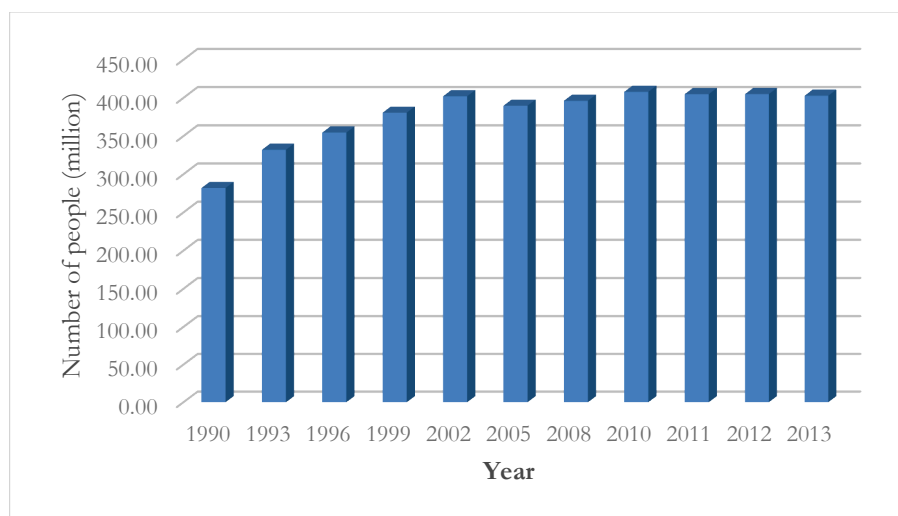


Figure 3: Number of people living below \$1.90 a day (World Bank 2018)

Put it differently, the increase in population has been faster than the growth in GDP such that even though the proportion of people living in poverty is reducing, the actual number of people in poverty is actually increasing. This obtaining situation is worrisome in that while the continent is experiencing fairly strong economic growth, the number of people wallowing in poverty is actually increasing. These realities put into perspective debates surrounding economic growth and poverty reduction paradigms. One such debate is whether the thrust on agriculture by most African economies is responsible for the high levels of poverty on the continent (Hazell 2011).

Of interest are the trends in income diversification in Africa so as to assess the potential for poverty reduction through other economic sectors. Davis *et al* (2017) conducted a study for the World Bank on impacts of income diversification in Africa. The study was based on 22 developing countries, 9 of which were African, but accounting for 51% of the continent population. The study found that outside of Africa, countries with higher levels of GDP growth are associated with a higher proportion of households with income portfolios that are diversified (45% outside Africa versus 29% in Africa), and their incomes are mostly non-farm (67% outside versus 37% in Africa). Most African households' income is derived from agriculture and as long as GDP per capita is low, dependence on agriculture remains high. The continent is less inclined towards wage employment both in agriculture (5% of income versus 13%) and outside of the sector (8% versus 21%). The implications are that most household economies in Africa are agriculture-based and are also not wage based (Davis *et al* 2017).

However, with most African economies being agricultural based, productivity in the sector is lagging average world standards. More than 90% of

agriculture is still rain-fed. Access and application of fertilisers and chemicals is still low and this is compounded by imperfect markets for resources and outputs. More so, problems of climate change, land degradation, and governance related problems in the continent further compromise productivity (Brown *et al* 2007; Nhemachena & Hassan 2007). While the continent exports mainly primary agricultural products, it has also become a net importer of staple foods. Its exports have declined from 8% of world exports in 1970s to 2% in 2016 (Veras 2017).

Lessons to African Agriculture from European and Asian Agricultural Led Growth

The agricultural revolution in Europe and Japan in the late eighteenth and early nineteenth century for example was premised on improving productivity through better technologies in mechanisation, irrigation, soil health and seed varieties. In livestock, focus was on maintenance of stocking rates as well as optimum herd sizes (AGRA 2017). Agricultural growth became a precursor to industry growth leading to stronger development. The Asia tigers had a different approach. Vietnam, India and China for example present a more complex agricultural development and economic growth model. Development in agriculture led to higher incomes and consumers demand more luxury goods and services; the proportion of necessities (most agricultural) in the consumer basket decreases. This in turn increases prices of non-agricultural commodities, and resources like capital and labour then moves out of the agricultural sector to these sectors with higher returns (AGRA 2017).

The growth in demand for non-agricultural commodities then spurs demand in education, as most non-agricultural jobs require special skills. Consequently, labour moves from the agricultural sector to the rest of the economic sectors. In agriculture, focus becomes more on technologies to replace labour which moves out of the farm. Consolidation of the farm also occurs, with large scale farms replacing family run farms. Contribution of non-agricultural GDP grows and agriculture gives up land to other sectors of the economy such as industries, urban settlements, and services. If land is abundant, a strong agricultural sector is created that caters for an expanding urban sector with fewer resources. If land is scarce, then the country relies on imports to satisfy increasing local demand (AGRA 2017).

African Experiences with Agricultural Led Growth

Africa has seen an increase in GDP growth (mostly from agriculture) from negative in the 1970s to about 2.3% in the 1980s, 3.8% from 2000 to 2005 and average 4.5% from 2006 to 2016 (World Bank 2018). Veras (2017) contends that the greater part of this growth is accounted more by increase in arable land

rather than agricultural productivity. Agricultural productivity in Africa is one of the world's lowest, though countries like Ethiopia, Liberia, Zambia and Mozambique achieved stronger agricultural GDP growth (Veras 2017). In some countries, stronger agricultural growth has not been necessarily associated with poverty reduction. Zambia for example recorded an increase in GDP from 2006 to 2011 but no associated poverty reduction was observable. Hazell (2011) argues that the major reasons lie in the household income inequality and policy inconsistency, where 93% of the country's agricultural subsidies were benefiting large farms. In countries such as Rwanda and Ethiopia, agricultural growth was associated with reduction in poverty. An agricultural growth rate of 10% in Ethiopia for example since 2000 has caused a reduction in poverty levels by 33% (Hazell (2011)). Rwanda focused on staple foods, tripling maize production between 2000 and 2014 and in the process reducing poverty (Hazell (2011)).

African Paradox of Growing Economies amid Stymied Poverty Reduction

It is evident from previous sections that both the economy and poverty in Africa are growing. This is against *a priori* expectation of increased economic growth and reduced poverty levels. There are a number of explanations that can be proffered for these unusual trends for Africa South of the Sahara over the past 20 years. A plausible explanation is that of strong inequality income differences between the poor and the rich, with the later having a high proportion of the income. However, this is not supported by available data (Chandy 2015). Even though Gini coefficients are unavailable at continent level, evidence at national level shows no particular inequality inclinations. Incomes are widening in many countries just as they are narrowing in others, while for some there are no changes in income inequalities. It is equally important to note that obtaining data on income equality is made difficult by the non-participation of the rich households in surveys to determine income distribution (Chandy 2015). The scarcity of evidence, such as tax registers that can aid in supporting the theory of inequality of income distribution makes this conclusion even more daunting. In any case, economic data shows that in most African countries, incomes are increasing for those households participating in the surveys. Therefore, inequality cannot sufficiently explain these trends.

Chandy (2015) suggested five possible factors to account for such high levels of households living in poverty in sub-Saharan Africa. The first is the high population growth rate, which on average has been at 2.6% over the past 15 years. This means that the income being generated is shared among an ever-increasing population (Chandy 2015). Average incomes, at 5.2% GDP growth rate in Africa, are increasing at a rate higher than the population growth, meaning that per capita income is increasing and extreme poverty is being

reduced, as evidenced by a reduction from 60% in 1996 to 42.3% in 2013 (World Bank 2018). However, the number of households living in poverty continues to grow because the rate at which the population is growing is higher than the rate at which poverty is decreasing. In addition, per capita growth rate (Table 1) is falling, with negative consequences on poverty reduction. For example, per capita growth in 2016 was -1.44% and when population growth of 2.7% in same year is lopped off, per capita growth is negative 4.14%. This is in comparison to world per capita economic growth of 1.3% and population growth of 1.1% in 2016, giving per capita income growth of 0.2% (World Bank 2018). Thus effectively, Africa's growth is way below world averages. The other confounding factor is the depth of poverty in sub-Sahara Africa relative to other regions. Studies by Chandy (2015) have shown that the most impoverished person in Africa lives on \$0.74 a day, while for the rest of the world, this figure stands at \$0.94 a day. This implies that taking households out of poverty (consumption of \$1.90/day or more) requires very high levels of economic growth for Africa than the rest of the world.

The third factor arises from the diverse income status of the member countries and high number of these countries. While no evidence supports changing levels of inequality among these nations, the inequalities were already high as a result of factors that have affected the countries in the past such as colonialism. In such circumstances, World Bank (2018) argues it is more difficult to reduce poverty just through increases in economic growth. The fact that Africa has so many countries (more than any continent) means that an assessment of Africa as a whole tends to hide a lot of differences between and among nations. Chandy (2015) argued that if Africa South of the Sahara was a single country (like China or India), then inequality was likely to be very high, such that any increase in economic growth would not immediately be associated with reduction in poverty levels. This can be contrasted say with India, which has a population congested just below the poverty datum line, such that any significant increases in incomes would be associated with significant reductions in poverty levels. These three factors are more important in explaining why poverty reduction has been so difficult. There are other factors that attempt to explain why the number of people living in poverty has continued to grow as enunciated below.

The fourth factor is that economic growth is not occurring in those areas where poverty is concentrated. The World Bank (2018) showed that over the past twenty years, Rwanda, Ethiopia and Mozambique for example have experienced phenomenal economic growth while others like Madagascar and Democratic Republic of the Congo recorded insignificant or no growth at all. In those countries with poor economic growth, the number of people in poverty has tended to rise. Therefore, sustained reduction in poverty requires also strong

economic growth rates from a large number of member states. Thus, strategies should not be targeted at continental level but also sub-categorisation on the basis of common factors. Lastly, data issues are problematic for Africa. Surveys are conducted infrequently, such that it is difficult to have reliable data and statistics tends to be either over or underestimated, such that Africa's poverty data needs closer scrutiny (Chandy 2015).

Delineating Possibilities Out of Poverty

The sections above have so far explained why agricultural (hence economic) growth has not resulted in poverty reduction in the greater part of Africa. The pertinent question to ask therefore is whether Africa is focusing on the wrong economic sectors for accelerated poverty reduction. This however, does not have a strait jacket answer. Already evidence has shown that Europe and Asia have achieved massive reductions in poverty through focusing on agriculture, first as a base and second as source of labour transfer. This has led to growth of other sectors in the economy (Chandy 2015). Even in Africa, it has already been shown that there are some countries that were successful in agriculture and thus managed to reduce poverty. These countries are however just among a few on the continent. Therefore, this sub-section focusses on two areas. The first is whether Africa should continue to rely on agriculture as an engine for poverty reduction and secondly whether there are other areas outside agriculture that have potential to reduce poverty. Again, the arguments presented are appealing only to the extent of specific circumstances that a particular nation faces.

Concerted Efforts in Agriculture

The argument put through is that African countries still need to focus on agriculture, but with a new paradigm. This discourse places emphasis on enhancing productivity and implementing appropriate policy initiatives. It is recognised that agriculture, despite failure in Africa, is two to four times as much effective in reducing poverty compared to other sectors of the economy (Christiaensen *et al* 2011; Pletcher 2013; Wiggins 2009; World Bank 2008). The impetus should be on increasing productivity, take market share currently with foreign suppliers in urban areas and reduce the import bill. A number of factors need to be tackled simultaneously to improve on productivity. One critical factor is the dependence on rain-fed agriculture in Africa. While 38% arable land in Asia is under irrigation, in Africa it is only 5%, and with the vagaries of climate change experienced over the past two decades and intermittent production inevitable (Veras 2017). Another challenge is the issue of soil health, which is related to depletion of soil nutrients. For example, Veras (2017) showed that average fertiliser use in South Asia is 100kg per hectare and in Africa it averages at 14kg per hectare. As a result, output per hectare in Africa is far way below

the rest of the world. The impact is massive soil depletion resulting from low fertiliser use and it is estimated that in Africa 100 million tonnes of nutrients are depleted yearly (Veras 2017).

Associated with fertiliser use are the costs, which in Africa are among the highest in the world (Veras 2017). This is the same whether a country is landlocked or not. Evidence shows that prices of fertilisers in Senegal and Nigeria are three times as expensive as those in India and Brazil (Veras 2017). Due to weak institutions, subsidised inputs such as fertilisers rarely reach the intended beneficiaries, with middlemen showing rent seekers tendencies (Veras 2017). While agro-chemical use has been high in Africa, its proper use has been the main challenge. Most farmers lack adequate information on the correct chemicals and application rates such that these agro-chemicals have posed environmental hazards and health challenges. In addition, access to quality seeds is still elusive, especially for smallholder farmers, who are the majority of farmers on the continent. A market driven system, where farming system research is encouraged, with a strong interaction between farmers and scientists would greatly improve seed systems. Addressing these areas would greatly improve on productivity (Davis *et al* 2017).

Another challenge for improving competitiveness of African agriculture is the international prices on the world market. This competitiveness is lost due to some trade dumping practices by developed countries, through subsidies that they offer to farmers in their home countries (Chandy 2015). For example, West African farmers have found it difficult to sell cotton on the world market due to extremely low prices on the international market. On the other hand, the United States of America, the world's second largest exporter of cotton, has subsidised its farmers to the tune of \$32.9 billion from 1995 to 2012 (Chandy 2015). This implies that even with low producer prices, these farmers still produced the crop (Veras 2017), flooding the market and negatively affecting global prices. Therefore, without subsidies by African governments, farmers will find it difficult to compete fairly and this reduces the possibility of very high economic growth rates. With African economies highly dependent on agriculture, the implications are that low prices will result in low incomes and this hampers the provision of infrastructure such as roads, electricity and safe water, especially for the smallholder farmers (Mckay & Sumner 2008). There have been some slight concessions on subsidies when developed countries agreed under World Trade Organization (WTO) to work on subsidy reduction by 2018, while developing countries have up to 2023 to do the same. Poverty stricken and importing countries were given another extended time to cut on export subsidies. It is expected that such measures are likely to create a balanced world market with greater equity and thereby reducing poverty among smallholder farmers through competitiveness improvements (Veras 2017).

Mechanised agriculture is also one critical requirement towards higher economic growth, and this has stagnated in Africa (Hazell 2011). Human labour provides 60% of farm power, showing the limitation that exists in improving productivity (Veras 2017). Engine power provides only 20% while draft power constitutes another 20%. Evidence shows that in both Asia and Europe, mechanised agriculture was a critical component in enhancing productivity through precision, timeliness and improved quality of activities (Veras 2017). While mechanisation results in reduced farm labour demand, the South Asian experience has shown that this can be compensated by increased demand for non-farm labour in industry and services. In Africa, most mechanised agriculture is being done by large agricultural corporates and farmers, with smallholder farmers still relying on draft power and manual labour. Therefore, policy shift should target mechanisation for staple foods given that African countries are still importing a lot of staples.

Focus on Non-agriculture Sectors as the Engines for Growth

The argument that has been put forward is, if there are any other sectors that Africa can focus on, with the potential to reduce poverty at a rate higher than that currently observed under agriculture led growth. These potential sectors which can be used as engines for growth are industry and services. It becomes necessary to analyse the potential of these sectors in transforming Africa and reducing poverty. In many African countries industrial activity makes up only a small proportion of all economic activity within the continent; with an average of 27% of national income over the past ten years (World Bank 2018), with a smaller proportion in poorer countries. Growth within this sector is unlikely to have the same impact as agriculture. In addition, the industry sector has been generally inefficient compared to agriculture. On average, industry growth has been 1.2% annually compared to 2.5% for agriculture since 1980 (World Bank 2018). More so, the industry sector over the past two decades has experienced enormous transformation, with a lot of activities now being undertaken by machines, thanks to the technological revolution. As a result, it is unlikely that this sector will significantly reduce poverty in Africa, where, 70% of the population is rural (average since 1980) though the average has reduced to 63% since 2012 (World Bank 2018).

The services sector has grown to be more promising with average growth rate of 52% of GDP (higher than agriculture) over the past 10 years and having the same labour intensity as agriculture (World Bank 2018). The sector is currently dominated by the public sector and the donor world and tends to have a national appeal. Consequently, the per capita income for this sector is low compared to the other sectors. Hazell (2011) suggested that it is unlikely that this can be an engine for growth given these low per capita incomes and dominance by the public sector. Hazell (2011) argued that it is unlikely that any

single sector can act as an engine for growth. To the contrary, a complimentary approach for these sectors would most likely achieve significant reduction in poverty. Agriculture and industry could provide such complementary roles for the continent than their individual contributions.

Collier (2007) suggested a different approach to derive priority areas that Africa should focus on to reduce poverty. This approach is strategic based, where instead of a blanket analysis of the continent, focus should be on categorising nations according to their competitive advantages then selecting the appropriate strategy for each category. The characteristics of the categories affect countries' abilities to achieve middle income status. Collier (2007) argued that agriculture was not the key sector for poverty reduction and categorised member countries into the following three; natural resource rich; resource scarce and coastal; and resource scarce and land-locked countries.

The opportunities and strategies for each of these groups would be different. For the group rich in natural resources, the appropriate strategy would be on extraction of natural resources rather than agriculture. Focus for this group would be on harnessing these resources efficiently and utilise the revenues prudently. This obviously requires a strong paradigm shift given the political and economic failures of most of such nations in Africa. One possible route is the Extractive Industries Transparency Initiative (EITI) which has focussed on tackling misuse of resources in Africa, though effective mechanisms have to go beyond that (Collier 2007).

For the group of countries that do not have resources but are coastal, focus should be on participating in global market systems. There are a lot of countries in the past two decades that have achieved very strong economic growth rates. Using this strategy, focus areas are labour intensive manufacturing exports, and so far, Mauritius has successfully used this path. Given that strong competitors such as Asian countries are already in this trade, for such countries to survive, they need to promote trade among African nations and protect the markets from Asian competition. The United States' African Growth and Opportunity Act (AGOA) which protect African goods and services from Asian competition in developed country markets is one such policy that has achieved enormous success in Madagascar textiles and created employment (Collier 2007).

The last group of resource-scarce and landlocked present the greatest challenges as there is no record of a country which has achieved middle income status with such characteristics, even agriculture. One suggested area these countries should focus on in addition to agriculture is on benefitting from the spill over effects from the other two categories of economies. Spill overs are improvements in a country's economic growth rate associated with improvements in their neighbours' economic growth rate. Evidence from the rest of the world shows that spill overs constitute about 0.6% of countries'

growth, but within African continent on average no such spill overs have occurred in the last 50 years (Collier 2007). Priority should therefore be on enhancing development of countries neighbouring resource scarce and landlocked countries, and the abilities of these nations to harness effectively the growth spill overs.

Institutional Policy Implications

The strategy that Africa or regions or categories discussed above choose have huge policy implications. The most important is fiduciary duty on the part of policymakers. The expectation is the politicians adopt those policies that have the highest potential of alleviating poverty. However, history has shown that for most leaders, personal gains precedes the public benefit that can arise out of a policy (Davis *et al* 2017). To this day, a lot of resources are siphoned from Africa by transnational criminals as well as some African leaders at the expense of whole populations and therefore poverty alleviation should be put in the context of these realities. Secondly, implementation of any policy initiatives mentioned above requires substantial resources, whether in agriculture or other sectors. Therefore, capacities for resource mobilisation need to be enhanced. Lastly, policy should be directed at re-education so that Africa has the skills to implement the various strategies for reducing poverty, especially for industry and services sectors.

Way Forward on Dealing with Technocratic (Neoliberal) Agenda for Agricultural Development

Transformation of Agriculture is Key

African agriculture's hope going forward is in transformation. For the continent to meet the entwined challenges of eradicating poverty, adapting to unfair global play, improving yields, incomes and food security, reducing biodiversity loss and responding to environmental change without depleting the natural resource base and reducing environmental quality, sustainable transformation is inevitable. For sustainable transformation priority actions must target (i) exploiting opportunities presented by the African "setting", (ii) increasing investments in agriculture, (iii) finding home grown sustainable financing solutions for agricultural development projects, (iv) harnessing indigenous technical knowledge to complement western knowledge systems for effective uptake of technologies and novel farming practices, (v) embracing climate-smart agriculture for ensuring that agriculture thrives under climate change, (vi) continuous efforts in upgrading smallholder value chains including adapting them to ever-increasing unfair competition presented by global value chains, and (vii) creating a conducive environment for transformation through

good governance, effective policies and strong capacitated institutions. Each of the aforementioned target areas for transforming African agriculture are discussed in detail in the following sub-sections.

a) Exploiting opportunities presented by the African setting

The African setting presents itself with a number of advantages for transformation of agriculture. First and foremost, huge hopes for successful transformation of African agriculture rest in the abundance of its human and natural resources. Africa has a growing middle class which is estimated currently at about 300 million people. This growth in middle class gives huge hope for developing the food market through increased demand. Resultantly, the continent's food market is projected to grow by USD 150 billion by year 2030 (Juma 2015). An overall growth in the entire agriculture and agribusiness sector is currently projected to grow by an estimated USD 1 trillion by the year 2030 (Juma 2015; Williams *et al* 2015). Also, the African continent is endowed with vast natural resources. For instance, the continent holds 10% of internal renewable fresh water resources (Williams *et al* 2015), 65% of the world's arable land resources (Te Lintelo 2012), on top of vast mineral resources and biodiversity (Alao 2007; Sachs & Warner 2001). All the endowments give huge potential for agricultural transformation as they can be used to support agricultural transformational activities.

Secondly, huge potential for transformation rests in the elasticity of poverty (reduction) to agricultural growth. According to various sources, optimised growth in agriculture in Africa is two to four times effective in reducing poverty than in other sectors (Christiaensen *et al* 2011; Pletcher 2013; Wiggins 2009; World Bank 2008). Precisely stated, a 10% increase in crop yields is linked to a 7% reduction in poverty (Pretty *et al* 2011; Williams *et al* 2015). This reduction in poverty include benefits realised through avenues like increasing income, employment, and nutrition (Headey *et al* 2010). More so, according to Haggblade *et al* (2007) the majority of the poor in developing countries stand to benefit more from an increase in Gross Domestic Product (GDP) emanating from agriculture than from an equal amount of GDP generated outside the sector (Cunguara *et al* 2011; Haggblade *et al* 2007).

Thirdly, growth in agriculture is also critical for stimulating productivity in other sectors e.g. manufacturing and service industry whose value chains further promotes wider economic impacts through their links with the agricultural value chain. According to the World Bank (2008), a 1% growth in agriculture generates approximately 1.5% growth in non-agricultural sectors (Pretty *et al* 2014; World Bank 2008). It therefore, implies that the potential in human and natural resources is a big opportunity for African agriculture to transform itself without much reliance on external (donor) support.

b) Increasing investments in Agriculture

“Investments” in infrastructure be it in production, marketing, research and development, supportive infrastructure (roads, energy, rail etc.), information technology among other sectors is key for transforming African agriculture. Levels of investment in African agriculture are very low which implies that there is huge space for new investment. Targeting of smallholder producers in investments which are dominant food producers in Africa can bring significant gains. According to World Bank (2008) and Fan *et al* (2008) public spending on agriculture is generally low in the very countries (mostly African countries) where the share of GDP is high (Fan *et al* 2008; World Bank 2008). Increasing investments in agriculture particularly small-scale farming will not only improve productivity but will also increase participation of youths in agriculture and reduce the number of small-scale farmers exiting agriculture (Filmer & Fox 2014). For instance, it is noted in Headey *et al* (2010) that smallholder farmers in Africa are exiting agriculture faster than in other developing regions, such as Asia possibly because of push factors (lack of meaningful investment) rather than pull factors (non-farm employment opportunities elsewhere). It therefore implies that improving investments in African agriculture can mitigate that trend and this will support transformation.

“Investments” in research and development in agriculture have been reported to be particularly very low and this has led to low rates of domestic innovation and productivity growth (McIntire 2014). To transform agriculture, there is therefore need to increase spending on agricultural research for development, building capacities of African scientists and deliberate targeting of agricultural research and technology transfer on smallholder farmers. Priority areas of technology transfer for smallholder farmers must be related to cost reductions in their key sectors such as communications, water supply, transport and input and output markets. More so, barriers to importations of proven innovations particularly, planting equipment and materials, fertilizers and other chemical inputs and irrigation equipment must be reduced in order to increase “investment” in the sector (McIntire 2014). “Investments” in supportive infrastructure including energy, markets, road and transport infrastructure, information and communication technologies should also be part of the road to successful transformation.

However, “investments” in agriculture have been on a steady increase though the biggest challenge has been volatility of “investment”. For Africa South of the Sahara, public sector agricultural research for development averaged around 20% during the period 2001-2008 (Nienke & Gert-Jan 2011; Pretty *et al* 2014). In the year 2008 in particular, the African region spent 0.8 billion (in 2005 constant US dollars) on agricultural research for development

and employed more than 12,000 agricultural researchers (Nienke & Gert-Jan 2011; Pretty *et al* 2014). There is therefore, need to ensure stable “investments” supported by national governments and donors to ensure significant transformation of the agricultural sector. More importantly, there is need for continuous targeting of improving human capacities (education) through “investments” in graduate programs and mentoring of young scientists for successful agricultural transformation.

c) Sustainable funding for agricultural projects

More importantly, the future for African agriculture rests in taking advantage of its vast resources and returns from other sectors to effectively support its own agriculture. Home-grown solutions to financing agricultural projects are potentially more sustainable than donor financed projects. This is important to consider for the future of agriculture and its successful transformation since in many agricultural projects relying on donor funding financial resources sustainability after donors have withdrawn their support have been a big problem (Ajayi *et al* 2018). Government funding on agricultural projects can potentially address financial resource sustainability in such circumstances. The idea will be to complement short term funding sources from the donor community with funding from government. African governments must therefore invest in capacitating local finance institutions for them to offer effective support to the agricultural sector. Also, subsidising smallholder farmers can improve success of the smallholder farmer. For instance, in Malawi government subsidies have been found to improve adoption of farming technologies, yields, and food security (Denning *et al* 2009; Dorward & Chirwa 2011). It therefore implies that finding sustainable long-term financial commitments from both government and donor community can keep hopes for transforming African agriculture alive.

d) Harnessing indigenous knowledge for agricultural transformation

Another often neglected aspect in agricultural development which is important for agriculture transformation is the successful harnessing of Indigenous Knowledge (IK). IK is important for a number of aspects including technology adoption, natural resources management, climate change management, biodiversity conservation and overall sustainable agricultural development (Mafongoya & Ajayi 2017).

By definition, IK is the institutionalised local knowledge built upon and passed on from one generation to another usually by word of mouth (Osunade 1994; Warren 1992). Harnessing IK will be important for successful agrarian transformation in Africa because it forms the basis for local decision making in many rural communities in Africa. IK is also important for agricultural planners,

policy makers, scientist and other developmental partners determined to transform agriculture in rural communities (Mundy & Compton 1991; Nyong *et al* 2007). Literature has shown that utilisation of IK by rural communities in poverty-stricken areas in SSA have helped them to thrive in extremely harsh environments (Hart & Mouton 2005; Reijntjes *et al* 1992; Scoones & Thompson 1994; Van Veldhuizen *et al* 1997). Historically, IK is said to have contributed significantly to development in agriculture worldwide such as domestication of crops and livestock, conservation of agro-biodiversity resources, development of animal traction and exchange of plant and animal species (Mettrick 1993).

In addition, IK systems become so much important as they create a moral economy. IK systems identify a person within a cultural context which provides decision making processes (rules of thumb) to be followed based on relationships or indicators within events (Adugna 1996; Woodley 1991). Members of the community work within the set rules of thumb in order to avoid risk of isolation from the community (Nyong *et al* 2007). In addition, IK systems share the same guiding principles with the sustainable development framework of simultaneously ensuring equity, economic prosperity and environmental sustainability (Davies & Ebbe 1995). Also, IK is increasingly gaining resemblance with scientific methods and many ideas in IK that were once regarded as backward and misguided are now seen as important and highly appropriate (Mafongoya & Ajayi 2017; Nyong *et al* 2007). More importantly, IK provide mechanisms for participatory approaches in agriculture. This is highly important since best outcomes in agricultural projects are said to be achieved when communities effectively work together. According to Nyong *et al* (2007) sustainability of agricultural projects in local areas are highly sustainable if local people are seen as partners in the project with joint ownership.

It therefore implies that IK can never be ignored in efforts to transform agriculture. The critical question to ask is how to successfully harness IK for agricultural transformation? The first step in integrating IK is be to acknowledge its capability in helping local communities in Africa through promotion of local innovations. Secondly, agricultural projects for transformation should see communities as equal partners in development. Local partners should carry greater responsibilities for their development and external partners should only back their efforts. More so, capacity building by external partners should emphasize the need to build on what already exists as IK plays a significant role in the sum total of what exists in a local community (Nyong *et al* 2007). Thirdly, development partners, scientists, and other agricultural planners must adopt bottom-up approaches when dealing with local communities as this ensures high level participation of local communities. This is highly important as it can provide insight on how communities and households interact and it allows beneficiaries to acquire necessary skills for them to forge their own paths to

sustain agricultural transformation programs. Fourth, and most importantly, IK should not be developed or harnessed as a substitute for formal scientific knowledge. The objective should be to find best ways of complementing the two.

e) Embracing Climate-smart agriculture

With climate variability and change as some of the worst challenges confronting African agriculture, embracing Climate-Smart Agriculture (CSA) in smallholder farming offers huge opportunities for successful transformation. CSA is an agricultural development approach that aims at meeting increasing food and nutrition demands and other developmental goals under a changing climate while also mitigating climate change (FAO 2018; Lipper *et al* 2014). The approach gives African agriculture huge hopes for successful transformation under increasing climate variability and change related stresses. The approach has three main pillars which are: increasing agricultural productivity and incomes, adapting agriculture to climate change and mitigating further carbon emissions.

Several technological interventions fall under CSA including; land and water management practices (agroforestry, water harvesting, crop residue mulching, irrigation etc.), improved livestock management (livestock manure management, rangeland management, livestock improvement etc.), and improved soil fertility and crop management practices (composting, efficient use of fertilizers, conservation agriculture, stress tolerant crop varieties, etc.) (FAO 2013). A number of emerging studies are showing positive impacts of CSA in agricultural productivity, income, poverty reduction, climate change mitigation and adaptation (see (Branca *et al* 2011; FAO 2018; Hansena *et al* 2018; Lipper *et al* 2014; Makate 2017; Waha *et al* 2018) which justifies why it should be one of the top priorities on the agenda for transforming African agriculture. Going forward, the focus with CSA should be on finding ways to effectively take CSA interventions to scale in order to maximize impacts to wider society. Making use of IK by integrating it into CSA policies and institutional strategies can be one way of achieving effective scaling of CSA. However, IK should complement scientific knowledge, rather than compete with it. Also, finding home-grow financing solutions for CSA projects will go a long way in ensuring sustainability.

f) Continuous Upgrading of Agricultural value chains

Continuous support and upgrading of smallholder agricultural value chains is also critical for successful transformation. Upgrading is defined by Kaplinsky & Morris (2001) as the acquisition of technological capabilities and market linkages that enable firms to improve their competitiveness and move into

higher value activities. Also, the various strategies that can be adopted or applied to improve competitiveness of the agricultural value chains are referred to as value chain upgrading (Humphrey & Hubert 2002; Penny *et al* 2014). Some of the activities include; improving performance, learning new job functions and adding value to production. Smallholder value chains in Africa need continuous upgrading. This should be done in order to improve competitiveness of the smallholder producer especially given the unfair competition presented by global value chains (e.g. strict sanitary and phytosanitary requirements).

When the motive of upgrading is increasing value added by changing the mix of activities conducted within the firm or moving the locus of activities to different links in the value chain, it is called functional upgrading (Kaplinsky & Morris 2001). Functional upgrading is important and can significantly reduce post-harvest losses (Penny *et al* 2014). An example of functional upgrading will be storing perishable agricultural products in cold rooms to improve their shelf life or canning of tomatoes. In addition, when the motive of upgrading rests in increasing efficiency of internal production processes to gain a competitive advantage over rivals it is called process upgrading (Kaplinsky & Morris 2001; Penny *et al* 2014). An example of process upgrading will be acquisition of new technologies into the production system to improve efficiency. Furthermore, when the objective is to shift sales between different markets for increased returns it is referred to as market upgrading (Kaplinsky & Morris 2001; Penny *et al* 2014). This can include moving from lower margin local markets to high value export markets, such as EU; but can also include entering higher-volume, lower margin markets such as China. It therefore means focus should be more on increased net revenue (volume by margin) (Penny *et al* 2014). Market upgrading often requires efficiency gains in transportation infrastructure and services and or meeting new standards and certifications to reach new markets. Another typology of upgrading is product upgrading and it involves introducing new products or revamping old products faster than rivals (Kaplinsky & Morris 2001; Penny *et al* 2014). Product upgrading involves for example, production of a high value product, such as the cultivation of organic produce or planting a high yielding bean variety.

The different forms of value chain upgrading present opportunities for transforming African agriculture. The different types of value chain upgrading can proffer significant benefits to the smallholder farming community and the nation at large. From literature, upgrading in the agribusiness sector is important as it improves productivity, integrate transformation activities to increase products shelf life and reduce post-harvest losses, and improve overall competitiveness of production (Gibbon 2001; Penny *et al* 2014). Furthermore, upgrading helps to increase domestic value added to agriculture, stimulate off-farm employment opportunities for rural populations and, by generating

additional incomes, alleviate liquidity constraints for smallholder producers (Henson & Cranfield 2009; Maertens 2009). All these benefits of successful upgrading are important for transforming African agriculture confronted by a myriad of challenges (Brooks *et al* 2013).

In line with improving competitiveness of agricultural value chains, Africa must ensure access to world markets. Lowering trade costs, entering into beneficial regional trade agreements and improving state of infrastructure can go a long way in promoting beneficial trade which can transform agriculture.

g) Governance, policy, and strong institutions

To increase chances of beneficial impact from investment activities in agriculture, good governance, strong institutions and pro-African policies which are consistent are required. Governance refers to the government's ability to make and enforce rules and to deliver services (Fukuyama 2013). On one hand, policy or policy strategies are the laws, treaties, administrative actions, statements, regulations and funding priorities from top decision makers from regional bodies and or government. On the other hand, institutions are the humanly devised constraints (*rules of the game*) that shape human and or organizational interaction and structure incentives from the interactions (North 1990). Organizations acting as stakeholders in agricultural transformation process are the players of the game and they include government (for example extension, research, and financial institutions), private sector (agro-dealers), civil society and others. The target for policy, governance and institutions must be to ensure a conducive environment for beneficial socioeconomic interaction (by key stakeholders) for agrarian transformation to prevail.

Effective policies, institutional strategies and overall good governance are relevant support pillars necessary for effective transformation. Effective policies and institutional strategies should target equitable access to land, strengthening regional cooperation, reducing conflict and removing barriers to agricultural trade. Equitable access to land is key for improving agricultural productivity and also long-term growth in agriculture. Regional cooperation in key sectors such as trade, water use for hydro power, transboundary biodiversity conservation just to mention a few examples can bring positive dividends in agricultural transformation. Reducing conflicts within the region is also key for transformation. This is because conflict and violence reduce agricultural production and trade. Research by Pretty *et al* (2014) showed that conflict reduce agricultural production in Africa. In addition, promotion of fair trade amongst African nations can be critically important for improving competitiveness of Africa agriculture even on the global scene.

Policies and institutional strategies also need to promote infrastructural development, reduce socioeconomic constraints in accessing key farming inputs

and credit and foster political will for agrarian transformation. Infrastructural development is key for long-term economic growth (Fedderke *et al* 2006). Also, reduction in socioeconomic constraints in accessing farm inputs and credit in the form of subsidies improve productivity and reduce poverty (Dorward & Chirwa 2011). Gaining political will for agricultural projects is important for ensuring sustainability of agricultural transformation projects.

Capacity building of agricultural personnel for instance extension personnel and institutions, ensuring accountability in agricultural projects, and effective monitoring and evaluation must also be areas of focus for effective transformation. Capacity building will promote efficiency in the transformation process. More so, accountability is essential for ensuring that resources are aligned to organizational objectives. In SSA corruption is noted as one of the major challenges to poverty alleviation strategies and food security (Pretty *et al* 2014). The region is believed to have the highest extent of corruption in the public sector (Transparency international 2011) which therefore presents huge challenges for smooth transformation. Effective monitoring and evaluation are required for feedback. This is critical as it allows for corrective measures or any necessary adjustments to be made in implementation of transformational programs/projects. Monitoring and evaluation will not only give important feedback on unforeseen aspects but can also educate on the opportunities and constraints for further transformation activities.

Conclusion

This chapter sought to explore the current debates on agriculture and its link to African development. The drive for development, especially as projected by outside forces has often been viewed with scepticism, as other nations and continents seek to have a competitive edge in exploiting Africa's resources and opportunities. Local policy makers often interpret the development models as colonialism in disguise. Evidence points to higher economic growth in Africa, but poverty levels are also on the increase. The mismatch between high population growth and per capita income growth accounts for the greater part of this paradox. Possible ways of reducing poverty have been explained and these include strategies focusing on agriculture, non-agricultural sectors and on the basis of comparative advantage. In agriculture, development possibilities should focus on exploiting current opportunities; increasing investments in agriculture, including its financing; harnessing indigenous knowledge, embracing climate-smart agriculture; upgrading value chains; improving productivity and strengthening market, governance and policy institutions. Non-agricultural sectors as engines for development are very difficult on their own, unless combined with agriculture since most economies are agricultural

based. In terms of comparative advantage, the categories suggested are resource rich (focusing on extraction), non-resource rich but coastal (focusing on export manufacturing) and non-resource rich and non-coastal (relying on spillovers).

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Growth Orientated African-centred Agriculture, Cooperatives and Policy Reforms: Towards Poverty Alleviation and Food Security

Ndou Moffat, Luvhengo Usapfa & Lekunze Joseph Nembo

Introduction

Food security in Africa has remained a challenge due to agriculture not being growth oriented; although the growth in agriculture, in its totality, cannot be blamed solely for the continued food insecurity in Africa. The challenge lies also with the approach used, policy strategies, and level of technology, infrastructure, political instability, resource endowment and government priority. Delgado (1999) argues that, African nations cannot afford to ignore smallholder agriculture as it is crucial to employment, human welfare, and political stability; and there exists an emerging shift in paradigms that growth in this sector is constrained by a number of structural policy stances. Although the notion of smallholder agriculture may vary across African states, one thing is common among them, the land ownership and hectares under cultivation are relatively small with low capital investments compared to large scale commercial farmers within Africa.

The more innovative question would be: why are African farmers generally smallholder farmers and the majority smallholders farmers in Africa are Africans while the majority of larger scale commercial farmers in the continent are non-Africans? One argument as to why African farmers remain smallholder can be attributed to centuries of land dispossession by the colonial systems. This argument has found resonance with most post-colonial governments in Africa which have introduced tenure, redistribution and restitution reforms as strategies within the broader land reform process to build social cohesion and political stability in the continent. However, despite the numerous land reform strategies, most African farms have remained small in terms of tenure. If this is the case then what would be the solution to smallholder farmers in Africa to grow to the size of large scale commercial farmers?

The challenge is the complete focus with much discourse about economies including agricultural growth based on Euro-American centred ideologies to the neglect of the needs and aspirations of dispossessed and exploited Africans. Therefore, there is the need to focus on African agriculture towards African

centred principles as well such that it grows from an African centre? The contemporary transnational land grabs are couched in terms of agricultural growth corridors yet the transnational land grabs dispossess African peasants in the name of growth for the sake of feeding Euro-American economies (Warikandwa, Nhemachena and Mtapuri 2017). Warikandwa, Nhemachena and Mtapuri, (2017) argue that, *“One of the fundamental challenges in deconstructing, rethinking and remaking the world from a Pan African vantage point is that some captives have tended to delight in the warmth of the [imperial] predator’s mouth. In other words, some captives forget that the imperial predator’s mouth gets warm because empire is eating and heating up from prey on the continent”*.

Sikor & Mu“ Ller (2009) argue that the debate on land reform has resurfaced on the development agenda of governments across Africa with focus on the recognition of customary land rights. Most Africans are demanding land reform with specific focus on restitution and redistribution of land from the colonialist and their descendants who have stolen African land and other resources. Policy-makers and governments in Africa have argued that redistributing land from colonial settlers and their descendants to the African owners of the land enhances the land rights of indigenous groups by way of legal and administrative acts. While within the continent, the clan authorities are clamouring for the recognition of customary land rights and custodianship on behalf of each clan, the landless individuals who form the majority within clans want restoration and restitution of land rights and tenure. This conflicting interest over who should actually be in control of the land has motivated global development debates on land reform as a strategy to improve rural livelihoods. The discrepancy in the food security may be due to spatial resource distribution among nations, policies strategies, or different systems most of which are inherently heterogeneous in terms of socio-economic demographics among other factors.

In South Africa for example, section 25 of the Constitution of the Republic of South Africa, 1996 (the Constitution) and the White Paper on Land Reform Policy released in 1997 demonstrated tolerance and wisdom in the country’s leadership in the three pillars of land reform; redistribution, restitution and tenure reform by combining redistribution, restitution and tenure reform as key drivers of the land reform process. This section of the Constitution focuses on redress in the form of restitution and ownership to address inequalities in South Africa. In South Africa, apartheid and colonialism were not merely totalitarian; they were illegal in their essence and systematic in dispossessing and exploiting Africans.

In the design of land reform policies, two main approaches readily come to mind: the ‘top-to-bottom’ or the ‘bottom-to-top’ approach. Each of these approaches has different influences on macro and micro politics and the roles of ‘state’ and ‘community’ in land reform. The top-to-bottom approach attest

to the limits of state-led land reform, that is, land reform programs conceived by national governments in a top-down fashion and implemented by their administrative branches. Such initiatives by government usually do not find support from the relevant local actors because of the varying meanings of land, plural notions of property, and diverse political-economic contexts.

The rise of collective farming systems in South Africa can be attributed to ever-changing government policies aiming to redress the inequalities of the past apartheid regime. The regime policies at the time affected agriculture and were effected through a series of legislative measures. The postindependence democratic government, with recommendations from the World Bank research group, embarked on a land reform process premised on redistribution, restitution and tenure legislations. The government took the lead in the design and implementation of these policies through a top-to-bottom approach. In the design of land reform policy in South Africa, the argument was that any compensation not based on market value would result in uncertainty and increase panic among “investors” to unacceptable high levels that are detrimental to the growth of the economy. It is on this basis that sections 25(5) & 25(7) of the Constitution laid the foundations for land redistribution and land restitution.

The process of restitution was to be a legal process intended to compensate people whose land was dispossessed after the Native Land Act of 1913. Recent arguments on land expropriation without compensation are based on the premise that dispossession of land in South Africa did not start in 1913. The initial dispossession of African people was never based on legality but on theft and robbery – on illegality. However, it is worth questioning whether expropriation of productive agricultural land, in South Africa, without compensation to the descendants of colonialists would solve the economic challenges of South Africa.

Although there is unanimous agreement across racial lines in South Africa for redistribution, there are sharp differences as to whether the existing policies have delivered the intended results. While proponents of the existing land reform policy argue that there is nothing wrong with the policy, government failures are to blame for the slow pace of land redistribution in South Africa. However, the failure of the land reform process in South Africa does not solely originate from the government failure. The United Nations also wrongly advised that market mechanisms are the most suitable instruments to address land inequality in post-apartheid South Africa.

Supporters of the land reform policy blame section 25 of the Constitution for not granting the government sufficient powers to expropriate land without compensation and they argue that the use of ‘market mechanism’ to redistribute land is a complete failure. Proponents of the status quo argue that, there will be

reduced food security, high unemployment rates, disinvestments in agriculture and declining economic growth if section 25 of the constitution is amended to expropriate land without compensation.

Data from the Department of Human Settlement and Agrarian Reform reveals that, by 2012, the redistribution and restitution programmes had altogether transferred a total of 7.95 million hectares. At this rate, the total area transferred by government programmes would have grown to some 9 million hectares by 2014. These figures exclude private land transactions between White sellers and non-white buyers from the official statistics. Furthermore, adding private transactions to official government statistics brings the total area transferred to approximately 12.5 million hectares (≈ 15 per cent) of South Africa's commercial farmland transferred during the period 1994-2014 (Ruth Hall Researcher 2004).

For the past twenty four years, South Africa has focused largely on democratic elections. This has generated impatience about the correction of previous material injustices. Thus, subsequently, systems and legislative structures have been put in place such as the Labour Relations Act 66 of 1995, the Employment Equity Act 55 of 1998 and BBBEE Act 53 of 2003. Land restitution, redistribution and tenure were the legislative tools implemented in the agricultural sector to assist dispossessed indigenous people.

The government-assisted land purchases have benefited some 460,000 rural households from 1994 to 2014, with redistribution and restitution accounting for almost equal shares of both land and beneficiaries. On the other hand, opponents of the current land reform policy have argued that, the persistence of high levels of poverty among previously disadvantaged South African are a direct consequence of this policy and want section 25 of the Constitution to be amended.

Beneficiaries of land redistribution and restitution have formed farming cooperatives. The expedited Land Rights Restitution Amendment Bill of 2014 suggests that restitution is increasingly becoming dominant. However, the new law does not change the criterion which has applied to land redistribution since 1994: each beneficiary household 'receives' almost 20 hectares of farmland. Incentives for individual beneficiaries to invest in farming enterprises are weak and so good quality land is often left idle or is used as communal grazing (Ruth Hall Researcher 2004).

In 2010 the Department of Rural Development and Land Reform initiated the Recapitalisation and Development Programme (RADP) to rescue 'distressed' land reform projects and over 1807 farms were identified for recapitalisation. The outcome of the land reform policy has two fundamental flaws; confusion in policy and expediency in practice. With the enactment of the legislative systems in agriculture, beneficiaries were provided with inputs

including agricultural extension services. Cash grants have been the cornerstone of land reform projects since 1995. The World Bank recommended such cash loans as new entrants could not finance land with mortgage loans because the market value of land exceeded its 'productive value'. The World Bank envisaged large numbers of emerging farmers purchasing farms of their own with cash grants and affordable levels of debt but the Department of Land Affairs saw land reform more as a means of alleviating rural poverty. Beneficiary households had to pool their meagre grants to cover the full purchase price of a whole commercial farm.

Land Reform in post 1994 South Africa forms the cornerstone of the re-emergence of the debate of the contribution of co-operatives towards poverty reduction and unemployment. Co-operatives have contributed to the world's economic growth, driven not by profit but rather by a desire to bring fairness, equity and justice to the marketplace. Co-operatives help people obtain goods and services that they may not otherwise be able to afford on their own, by pooling together their purchasing power. Co-operatives help build stronger communities. Since most co-operatives are community- and regionally-based, investment in and surplus revenue from the co-operative stays within the local community. Money invested in the local co-operative has a significant multiplier effect within the community (DTI 2012).

The Department of Trade and Industry (DTI 2012) South Africa, in its strategic document on promoting an Integrated Co-operative Sector in South Africa, has acknowledged that a genuine, autonomous and economically-viable co-operatives movement has vast development potential to contribute towards resolving the country's socio-economic challenges. The document states that, the rationale for the development of co-operatives include; economies of scale and scope; increased bargaining power; community participation and development; member participation, motivation and value (as compared to shareholder value); representation of interests and stability as well as innovation and legal protection. The strategy seeks to close the existing gap in the promotion and development of co-operatives in South Africa; accelerate the implementation of the National Co-operatives Policy and the Co-operatives Act; to provide and streamline support programmes, and increase capacity for their roll-out; and to strengthen the institutional framework for the implementation, co-ordination, monitoring and evaluation of co-operatives development in the country. Indicators that can be used to monitor co-operatives in South Africa and evaluate their progress are based on forms, types, sectors, targeted groups, as well as measuring their inputs, outputs and outcomes.

Co-operative Movement and Socio-Economic Contribution in South Africa

The concept of co-operative as a distinct business model originated back in the 19th century in Britain under the concept of ‘pull together’. Precolonial Africans had work parties with similarities to co-operatives. During these days, co-operatives were used as tools to drive the common objectives of individuals as collectivities. It is logical for one to argue that the formalisation of co-operatives was a Euro-centric idea but the phenomenon of collectivisation in Africa has existed before colonisation. During the era before the formalisation of co-operatives, the majority of collective entities were operating under the common core of trust with limited legislative backing. The Rochdale Society became the first ever recorded collectivity of workers under different trades. Apart from the existence of these entities in other sectors for some time, agricultural co-operatives started to emerge in the late 1900s due to economic stress and other policy factors brought about by the economic depression (Ortmann and King 2007). However, co-operation is not an invention of the west. Historians have found evidence of co-operation in African groups of people and early agriculture would have been impossible without co-operation between African farmers. In early African societies people learned to co-operate and work together to increase their success in hunting, fishing, gathering foods, building shelter, and meeting community needs. (ILO 2014).

Globally, co-operatives have existed for centuries and have proven to be flexible compared to partnership, private and or public/private limited companies in meeting the social and economic needs of communities. Global experience has shown that, countries with successful economic development track records also have successful co-operative sectors contributing substantially to the growth of their economies. International studies reveal that countries which have created an environment conducive to promoting co-operatives, by developing legislative instruments, supportive programmes and delivery institutions, grow rapidly and contribute positively to economic development, employment creation, economic ownership by local communities, and human resource development. Canada, Spain, Kenya, Italy, India and Bangladesh have proven to be successful in the development of co-operatives and best practices were drawn from their experiences to inform the strategy, according to DTI (2012).

In South Africa, co-operative strategy aims at closing the existing gap in development; accelerate the implementation of the National Co-operatives Policy and the Co-operatives Act; provide and streamline support programmes, and increase capacity for their roll-out; strengthen the institutional framework for the implementation, coordination, monitoring and evaluation of co-

operatives development in the country. Indicators that can be used to monitor co-operatives in South Africa and evaluate their progress are based on forms, types, sectors, targeted groups, as well as measuring their inputs, outputs and outcomes. Growth in their value (assets and operational capital), number and contribution to South Africa's GDP growth rate are also key evaluation indicators in South Africa (DTI 2012).

Patnaik (1996) argued that the set of economic policies labelled economic liberalisation, stabilisation and structural adjustment adopted by developing countries are having profound impact on the nature of the development process in these countries, and especially on food security. This argument is supported by Lin (1992) in a study to assess the contributions of de-collectivisation, price adjustments, and other reforms to China's agricultural growth in the reform period and found de-collectivisation to improve total factor productivity. This led to the adjustment of China's state policy from collectivisation to de-collectivisation which contributed positively to output growth. In China, broad changes in rural policy started in 1978 with government's intention being to modify management methods within the collective system as a way to improve agricultural productivity (Lin 1992). However, change from the collective system to the household-based farming system, in China, is one of the most radical economic reforms the government has taken. Nevertheless, experiments by small numbers of production teams with the blessing of local authorities found yields of individual farms under de-collectivisation teams to be far larger than those of collectivisation teams leading authorities to concede de-collectivisation farming is better than collectivisation but restrict such forms of farming to poor regions (Lin 1992).

The legislative framework governing co-operatives in South Africa from 1922 to 1981 bears no strict adherence to international co-operative principles and norms. The legislation did not articulate, nor encourage co-operatives to adhere to the international co-operative principles. Furthermore, most of the co-operatives were predominantly White agricultural co-operatives, aimed at developing and building the White farming community which eventually developed into powerful business ventures, which controlled agricultural production, marketing and processing in rural areas (DTI 2012).

South Africa developed pieces of legislation which supported White co-operatives such as the Land Settlement Act 12 of 1912; 1913 and 1936 Land Acts; Co-operatives Societies Acts of 1922 and 1939; and the Natives Administration Act of 1936. Marketing Boards were established through the promulgation of the Agricultural Marketing Act 27 of 1937. The Boards were tasked with fixing the prices of agricultural commodities; and acted as secondary co-operatives that purchase produce from co-operatives and market it locally and internationally (DTI 2012). The state also provided subsidies and tax

exemptions to these White co-operatives. Black-owned agricultural co-operatives were promoted by the then government in the 1970s and 1980s as part of the apartheid economic grand-plans for the 'homelands'. However, they did not enjoy the type of state support provided to White agricultural co-operatives and remained weak and underdeveloped, and even collapsing.

The period from 1995 to 2000 saw co-operatives development being moved from the Department of Agriculture, and as a signatory to the International Labour Organisation (ILO) South Africa adopted recommendation 193 of 2002 for the Promotion of Co-operatives. Beyond the traditional agricultural sector, black-owned co-operatives began establishing themselves in different sectors of the economy, such as manufacturing, construction, transport, housing, services and Information Technology (IT). The promulgation of the Co-operatives Act 14 of 2005 facilitated a boom in the registration of new co-operatives never seen before in South Africa. According to the CIPC register, 19,550 new co-operatives were registered from 2005 to 2009 in various sectors, representing a growth rate of 86%. The majority of these new co-operatives are Black woman-owned: youth-owned co-operatives also began to emerge. However, most of these new entrants remain vulnerable and very weak and require high and sustained levels of support (DTI 2012).

Economic Participation of Co-operatives and Poverty Alleviation in South Africa

In 2005 co-operatives in South Africa were legislated as institutional collective alliances under the Co-operatives Act 14 of 2005. In terms of the Co-operatives Act, co-operatives were defined as an autonomous association of individuals gathering or coming together in attempt to achieve their common objectives which are mainly but not limited to: economic, social, and cultural needs and aspirations. In the preamble of the Co-operatives Act, the Act recognises:

(a) The co-operative values of self-help, self-reliance, self-responsibility, democracy, equality and social responsibility;

(b) that a viable, autonomous, self-reliant and self-sustaining co-operative movement can play a major role in the economic and social development of the Republic of South Africa, in particular by creating employment, generating income, facilitating Broad-Based Black Economic Empowerment and eradicating poverty;

(c) that the South African economy will benefit from increasing the number and variety of viable and sustainable economic enterprises; and

(d) that government is committed to providing a supportive legal environment to enable co-operatives to develop and flourish.

The preamble of the Co-operatives Act, further provides that the purpose of the Act is to recognise and implement the international co-operative principles; and to facilitate the provision of targeted support for emerging co-operatives, particularly those owned by women and Black people. Section 2 of the Co-operative Act explains further that the purpose of the Act is, *inter alia*, to:

(a) promote the development of sustainable co-operatives that comply with co-operative principles, thereby increasing the number and variety of economic enterprises operating in the formal economy;

(b) promote equity and greater participation by black persons, especially those in rural areas, women, persons with disability and youth in the formation of, and management of, co-operatives;

(c) establish a legislative framework that preserves a co-operative as a distinct legal entity;

(d) facilitate the provision of support programmes that target emerging co-operatives, specifically those co-operatives that consist of black persons, women, youth, disabled persons or persons in the rural areas and that promote equity and greater participation by its members; and

(e) ensure the design and implementation of the co-operative support measures across all spheres of government, including delivery agencies, and adherence to a uniform framework of established norms and standards that reflect fairness, equity, transparency, economy, efficiency, accountability and lawfulness.

The objectives of the Co-operatives Act are in line with the remedial and restitutionary measures for the achievement of the constitutional goal of a free, prosperous and egalitarian South African society (Janse Van Rensburg 2010). This is also in keeping with the country's BEE strategy, which aspired to achieve, *inter alia*, the following policy objectives:

(a) a substantial increase in the number of black people who have ownership and control of the existing and new enterprises.

(b) a substantial increase in the number of black people who have ownership control of existing and new enterprises in the priority sectors of the economy that government has identified in its microeconomic reform strategy.

(c) an increasing proportion of the ownership and management of economic activities vested in community and broad-based enterprises (such as

trade unions, employee trusts, and other collective enterprises) and Co-operatives.

(d) increased ownership of land and other productive assets, improved access to infrastructure, increased acquisition of skills, and increased participation in productive economic activities in under-developed areas including the 13 nodal areas identified in the Urban Renewal Programme and the Integrated Sustainable Rural Development Programme.

Section 4(2) (d) of the Co-operatives Act recognises an agricultural co-operative as a form of co-operative regulated by the Act. Section 1 of the Act defines an agricultural co-operative as a co-operative that produces, processes or markets agricultural products and supplies agricultural inputs and services to its members. As soon as the co-operative is registered, it is considered as a legal person. The Department of Trade and Industry has the responsibility, in terms of section 8(2) of the Co-operatives Act, to support registered co-operatives complying with the co-operative principles and consisting of Black persons, women, youth, disabled persons or persons in the rural areas and promotes equity and greater participation by its members. Part 4 of schedule 1 of the Co-operatives Act provides for further issues relating to agricultural co-operative which falls outside the scope of this chapter. The effect is that agricultural co-operatives must comply with the provisions relating to all co-operatives and part 4 of schedule 1 of the Co-operatives Act.

It is clear that the Co-operatives Act recognises that a successful co-operative movement in South Africa can play a major role in the economic and social development of the country. The Co-operatives Act also emphasises that government is committed to providing support to enable co-operatives to develop and flourish, especially for black persons, women, youth, disabled persons or persons in the rural areas. It is clear when the Co-operatives Act was promulgated, that the promotion of co-operatives was seen by the government as a means of alleviating poverty, and promoting equity and greater participation of Black people, especially residents of rural areas, in the country's economy (Sarkin 2015: 284).

Land Policy towards Expropriation without Compensation

On 19 June 1913, the apartheid government took a major step in dispossessing Black people of land, when the Native Land Act 27 of 1913 was passed. The effect of the Native Land Act was to restrict the Black majority population from hiring or owning land in 93% of the land in South Africa. The Native Land Act included a schedule of areas considered as the Native areas. The Schedule of Native Areas provided a list of the areas that Black people were

allowed to settle in. Section 1(1) of the Native Land Act was very clear that a 'native' was not allowed to acquire or enter into an agreement to acquire land without the approval of the Governor-General. The contravention of these provisions amounted to an offence in terms of section 5 of the Native Land Act. Modise and Mtshiselwa (2013) argue that the land dispossession of the indigenous people of South Africa under the Native Land Act caused poverty which is still prevalent in our country today. Many South Africans, especially Black South Africans, are trapped in a cycle of poverty that emerged as a result of our history of colonialism and apartheid; and land dispossession.

A combination of ideological and pragmatic considerations informed the acceptance of the protection of property rights in the new Constitution of 1996, and the adoption of a 'willing seller, willing buyer' (that is market-friendly) approach to the acquisition of land for redistribution. Scholars of land reform have suggested a shift from state to community in the initiation of land reform and have argued that, community-led initiation have the potential to link state action better from the bottom and property relations on the ground with the recognition of customary institutions responsible for land rights. They argue that, with such an emphasis on community the right of the state to play a role in land reform is not denied but such a state should be one that is more developmental oriented from the grass roots. Furthermore, the state should be more responsive to variation in local institutions and practices as land reform is witnessing significant change in its concrete forms today as more diverse sets of developmental policies, agendas, power relations, global economic dynamics and political interference define the outcome (Sikor & Mu" Ller 2009).

Until 2006/07 the primary mechanisms for redistribution involved several onerous bureaucratic procedures: applications for grants for land purchase and land development, award of such grants, establishment of legal entities to own land, and business planning. Business plans have often been poorly aligned to the resources, needs and desires of beneficiaries. Land reform was the primary vehicle by which to break the power base of powerful land owners and redistribution to landless people, tenants, and smallholders. Reformist governments are of the view that land reforms have the potential to enlarge their political support base by appeasing the demands of the rural and weakened the position of large conservative landowners. The agenda for land reform has become more diverse and it is no longer confined to redistributive reform but the term 'land reform' is commonly used to refer to "colonisation" programs on publicly owned land, land registration, consolidation of fragmented holdings, tenancy improvement, and land taxation. The recognition that access to land is constrained in multiple ways, and states have a variety of legal and administrative instruments at their disposal to enhance land rights of disadvantaged groups has given rise to three primary approaches to land reform. Redistributive land

reform which involve expropriation of land from large landowners by governments and allocate to rural people through administrative procedures as the case of South Africa where it is done through 'willing buyer, willing seller'. In this method, the principal medium of transaction is the market forces of demand and supply of land facilitated through subsidised loans offered by the government (Sikor & Muñ Ller 2009).

Delgado (1999) emphasises on the context of missing markets in Africa where small and large farm households in rural areas may not have access to the same technology, information, asset base, input supplies, and market outlets, since the market institutions are absent. Research reveals, transaction costs in marketing and processing in Africa arose because market prices do not fully reflect the true costs and returns to participation for all market actors (Delgado 1999). His research showed that, smallholders require improvements mainly towards access to assets, information, service and remunerative markets beyond environmental factors that contribute to transaction cost.

Although subdivision of large farms acquired for land reform is allowed in law, very little has taken place in practice. In some ways South Africa's land reform has combined the least effective aspects of both state and market-driven approaches. These problems, together with the slow pace of redistribution, have led to widespread dissatisfaction with the 'willing seller, willing buyer' approach. Partly in response, government is debating and making consultations to pass a new expropriation law consistent with constitutional provisions that compensation must be 'just and equitable' (but note that the law has not been passed yet. Parliament is still at the consultation stage of the promulgation of this law). Studies across Africa have found that, the most common approach to land reform in Africa is land registration and land titling. Land registration and titling have focussed on registering individual land claims and land titling to the neglect of existing tenure systems and responses to new demands for land. The rise in new debates on whether the top-to-bottom led approach to land reform which are usually conceived and implemented by government and in an efforts to formalise customary claims on land made by collective actors, such as villages and ethnic groups, and/or recognise the authority of customary leaders over land, conflicts have emerged (Sikor & Muñ Ller 2009) is an indictment to the current land reform policy in South Africa.

The expropriation of land as debated by South Africans will enable farm valuations to take account of a range of factors other than market value, such as the current use of the property, the history of its acquisition and use, the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and the purpose of the expropriation. Scholars have argued that, post-totalitarian land distributions is to return control of land to people whose lands were stolen by totalitarian regimes in the past and

place under the control and management of agricultural collectives, state enterprises and large private farms as was the case with the apartheid regime of South Africa. Communities, clans, villages and individual claimants can reclaim land dispossessed under racially discriminatory policies in South Africa but the continuous focus on the state as the primary initiator and implementer of land reform remains problematic as it is implemented through market mechanism.

The approaches by the state not only continue to inform policies but have entrenched inequalities and further alienate the very poor land reform policy intended to alleviate and awaken the debates whether land tenure generally provides security for the insecure in South Africa. The debates have laid bare the perceived argument whether the problems in African agriculture were inherent in customary land tenure and dispossession than in broader social, political and economic conditions prevailing in these countries. Research has found that, land claims are not a matter of simple recognition of 'what is out there' by the state although they found local land tenure systems to be highly diverse and inclusive (Sikor & Mu" Ller 2009). The question now is who will lead expropriation without compensation in South Africa if section 25 of the Constitution is amended. Although land expropriation without compensation during the colonial era was led by the state, alternative approaches need to be explored given the failures by the government in implementing the existing land reform process in South Africa.

As policy makers in South Africa embark on the amendment of section 25 of the Constitution, in the near future questions as to what was the original objective of land reform?, need interrogation. Was the objective of land reform to establish Black commercial farmers or simply to give the landless poor access to farmland? In essence, who sets the agenda when it comes to land reform in Africa? Is it the disenfranchised majority or the government of these states some of which by extension are proxies to neo imperialist states? The government has accepted to review section 25 of the Constitution with the objective of defusing popular uprisings across the country. This legislation applies to land redistribution and restitution. In terms of the legislation in its current form, government is responsible for identifying and purchasing farms, subdividing them into smaller units, assessing applicants and their business plans, selecting tenants, monitoring their performance, collecting rent and evicting non-performers.

Charging market prices to purchase farms poses a formidable barrier to existing land ownership in South Africa by Whites who claim to possess jurisprudential notions and practices of "private" ownership - private ownership largely implies western ownership. There is absence of ownership of land by the dispossessed Black majority in South Africa and the property clause in the Constitution has rendered land reform process to be very slow. Both the

government and the private land owners can work together to bring about speedy transfer of land while at the same time avoiding disinvestment in the economy. The government can offer emerging farmers a range of farm sizes but facilitate subletting so that tenant farmers can adjust the size of their farming enterprises to match their own abilities and resources. The creation or refocusing the mandate of existing land banks financed equally by the private and public sector were a finite, diminishing interest rate subsidy for mortgage loans offered to small-scale and emerging farmers who wish to purchase land. There is need to institute new policies that acknowledge private land transactions between sellers and buyers, and facilitate these transactions by removing legal restrictions that constrain the subdivision of farms. However, this policy should be designed in such a way that it focuses on the impoverished and dispossessed majority rather than the few privileged Africans. Any land reform policy that targets the privileged minority African middle and upper class to the exclusion of the disenfranchised majority is a recipe for future destabilisation.

Opponents of the land expropriation without compensation debate argue that, expropriation without compensation is not possible without a change to the Constitution while proponents argue that it is the failure of government to correctly implement section 25 and not the legislation itself that is a failure. Proponents further argue that, the government since 1994 have never tested the parameters of section 25 in courts when it relates to the expropriation of land without compensation. Some political formations, such as the EFF, have called for the property clause to be amended, so that land can be expropriated more cheaply and easily. However, it is not clear that the property clause is in fact a fundamental constraint on land acquisition and transfer on a large scale. The failure of the state to target appropriate land for purchase and to negotiate good prices, together with the ruling party's lack of political commitment to land reform, are also possible failures. Acquiring farms at prices below market value is possible, given that compensation must be 'just and equitable'. At prices much lower than say, 15-20% below market value, land reform might be slowed to a crawl by court action. If the budget for land reform increased from its present level to, say, 2-3% of the total, then land purchase would be more affordable.

In other respects, the Constitution is an enabler for land reform, rather than disabling; in particular, section 25(6) of the Constitution, which requires that the state secure the land rights of black South Africans, is of key strategic significance. All forms of property are protected, not only private property. Given evidence of attempts at state capture by elements of capital, and the woeful human rights record of mining operations in communal areas, measures to protect the poor from dispossession are required, and the property clause is one such measure with considerable legal clout. Section 25 of the Constitution

was established by the government with the view that redistribution of farmland would make a significant contribution to poverty alleviation. However, there is evidence that, registration and title deeds to land have often created and exacerbated conflicts over land and entrenched inequalities in access to land rather than to reverse the very problem land reform policies intend to solve.

How then should we approach land reform as it has become clear that community-led reforms cannot be thought of as separate from or incompatible with the actions of the state as evidence suggests that whether ‘state led’, ‘community led’ or ‘customary led’ approaches have failed to clarify the rights guaranteeing the right to access land by the poor.

These approaches have made the situation more complex and intensify contestations over rights, norms, security of tenure and informal land transactions. Community-led land reform can take different forms ranging from distributing ownership titles to a variety of social groupings, to recognising the authority of local institutions over land. It is in this light that policy-makers, activists, interest groups and traditional leaders have engaged in various debates across the country in 2018. The view is that current land reform policies based on section 25 of the Constitution underpinned by the market mechanism has not delivered its intended results of redistribution, poverty alleviation, income security and reduces inequality. While the debate rages on whether there should be a shift from the current form of land reform in South Africa to a new form, the focus has mainly been on the role and authority stakeholders will control in the allocation and administration of land rather than to address the skewed ownership in favour of the majority who have been turned landless. This debate in South Africa exemplifies a wider approach in Africa as many African governments have chosen a diversity of strategies to distribute authority rather than focussing on the actual people who need land for livelihood (Sikor & Müller 2009).

Land Policy, Agriculture and Food Security

South Africa’s unemployment rate is amongst the highest in the world with an expanded unemployment rate of 40%. Females are bearing a higher unemployment burden (46%) compared to males (34%) in the country. The unemployment rate also varies depending on the region and location; in some rural areas the recorded unemployment is as high as 70% as compared to just 46% nationwide. It can be only obvious that unemployment, income and expenditure are correlated. This means that rural poor people and unemployed rural residents and urban residents are most vulnerable to food and nutrition insecurity. Also, people with disabilities have a high nutritional requirement and most of them do not have people to look after them to ensure that their needs

are met and this creates vulnerability to food insecurity. Furthermore, HIV/AIDS raises the nutritional requirements of a household as people living with the disease have a higher than normal nutritional requirement to support their degenerated immune system. In addition, the nutritional requirements of pregnant women increase to support the development and growth of children. The impacts of HIV/AIDS are worse for pregnant women. About 28% of pregnant women in 2009 were living with HIV/AIDS.

In South Africa, the land reform policy claims it can improve food security level and reduce poverty levels in rural areas. This claim is substantiated by the view that, making land available to the majority will enable people to grow their own crops and livestock resulting in improved flow of food and potential income from sale of surplus. Therefore, this will reduce the overall level of poverty and allow for enhanced nutrition and human development in the country. Ruth Hall Researcher (2004) indicated that, land reform is one way in which the 'new' South Africa set out to redress the injustices of apartheid and, by redistributing land to Black South Africans, to transform the structural basis of racial inequality.

Studies in Asian countries have supported this claim for example; a study conducted in India revealed that land reform resulted in reduced rural poverty. This was because rural wages increased due to employment opportunities provided to the landless (Besley and Burgess 2000). In West Bengal, the Nijo Griha Nijo Bhumi land-allocation programme was reported to have improved food security of rural households through price reduction due to cut-down transaction costs (Santos *et al* 2013). Ruth Hall Researcher (2004), has argued that a recent shift in land policy, from a focus on the rural poor to 'emerging' Black commercial farmers, is consistent with changes in macro-economic policy and reflects shifting class alliances but focuses on a limited deracialisation of the commercial farming areas rather than a process of agrarian restructuring. The land reform programme in South Africa has not yet provided a strategy to overcome agrarian dualism and the policy is being informed by shifting politics in the post-transition period in South Africa. In a study by Ricardo (1817) as quoted by the Ruth Hall Researcher (2004) it is noted that the principal problems in political economy are the relations and distribution of resources among three classes, namely 'the proprietor of the land, the owner of the stock or capital necessary for its cultivation, and the labourers by whose industry it is cultivated'.

Another factor that contributed significantly towards the success of land reform in the above mentioned regions was that they were also more likely to access credit and invest in agriculture. Apart from improved land tenure for majority of rural population, women reported significantly improved tenure security, as a result of being granted land titles, which is likely to lead to long-

term food security, even though food security itself was not initially realised. The programme's weakness was that financial constraints meant that many families did not move to the larger plots provided, which prevented the full benefits of the allocated land from being realised. These results suggest that reforms aimed at production relations in agriculture can play a significant role in reducing poverty. They found that, the advent of non-racial democracy have generated class interests and resulted in the emergence of powerful alliances that believe in the principles of deracialising ownership while maintaining the past totalitarian structure of the farming sector (Ruth Hall Researcher 2004). This approach to land reform is more symbolic towards the morphometry of the new nation state as envisaged in 1994 than it addresses the historical injustice. The idea of land reform was to transform social and economic relations and provide a structural basis for Broad-Based Pro-Poor Development (Ruth Hall Researcher 2004).

Land reform is often based on the assumption that more rural based smallholder farmers could be more productive than a few large-scale farms. Adams (2000), stated that this assumption could be fuelled by the view that small farming enterprises are owner-operated rather than managed by wage labour. The involvement of the owner as a worker and a manager results in reduced supervision and managerial costs, and improves overall productivity. Another reason stated by Fan and Chan-Kang (2005), for the assumption that these farms are more productive is that they tend to have greater application of productive inputs such as fertiliser and seed, and use the land more intensively compared to large scale operations. As concluded in the previous paragraph, land reform policies in majority of the Asian economies have resulted in increased productivity and profitability for small rural farmers, however this is dependent mainly on two things; the type of farm production (enterprise) as well as the associated security of property rights and institutional support.

To achieve this there was the need to change the status of existing property rights but interest groups successfully lobbied to include a 'property clause' that recognised and protected existing property rights which set the tune for future challenges in land reform programme in South Africa (Ruth Hall Researcher 2004). The government at the time with inexperience in governance followed the advice of the World Bank to promote 'market-led' model of land reform and argued that redistributing land and creating a class of Black smallholders was necessary to avert social and political instability, as well as to promote rural development. Today, the model is widely criticised for its complexity which has reproduced overcrowding in former Bantustans areas, abandonment of the pro-poor agenda due to failure to transfer 30% target even with an extended period of 15 year to 2015 (Ruth Hall Researcher 2004).

Even though the ‘smaller and more productive’ view is supported by some authors, there are other authors (Adams 2000) in opposition of this view. These authors stated that this assumption depends on the type of an enterprise or operation and the policy factor in that particular environment (Fan and Chan-Kang 2005). Same as the so called ‘Green Revolution’, it resulted in increased economies of scale for some agricultural operations, however, this brought about greater reliance on capital inputs and more sophisticated production procedures. In addition, small-scale farmers face significant barriers to entry, particularly in high-value export products, which require large inputs, such as herbicides, fertilisers and chemical pest control. These costs, together with the high costs of credit and substantial production risks, present difficulties to new entrants in agriculture, particularly the small-scale producer. Such costs can be mitigated by state institutions employing reforms to assist small-scale farmers with access to credit, technology and market linkages (Fan and Chan-Kang 2005). Apart from the positive impacts of land reform in some Asian regions, in some countries such as Peru and Japan, agricultural production remained constant after the implementation of land reform. In Japan, Weideman (2004) stated that this was partly a result of investment in infrastructure and the provision of support services to land-reform beneficiaries. In South Africa, Lyn and Ortmann (1996) found that livelihoods increased moderately when redistribution occurred from large to small farms, with no change in the quantity and extent of crop production in KwaZulu-Natal (KZN). The varied empirical results from the literature demonstrate the nature of the land reform policy, and that the economic and social contexts are critical factors determining the effect of a land-reform programme on agricultural production (Weideman 2004).

However, proponents of this policy claim that redistribution has worked although it is impossible to identify the power relations of beneficiaries in the society, socio-economic profile of applicants reveals a substantial variation between the poor and the rich but skewed in favour of the rich and mostly men thereby entrenching inequalities and gender discrimination within impoverished communities of South Africa (Ruth Hall Researcher 2004). Evidence to this effect is that, since the start of the programme, 63,455 restitution claims were lodged by close of December 1998 with rural claims constituting approximately 20,000, only 41 of the 63,455 claims was resolved by 2004 (Ruth Hall Researcher 2004).

In South Africa, several barriers to land reform exist, including limited fiscal allocations and institutional incapacity, and bureaucratised state procedures which lead to overspending \corruption. In addition, beneficiaries indicated that, land acquired is often a long distance from the place of residence of beneficiaries, resulting in land not being utilised to its full potential (Valente 2009). The grants issued to beneficiaries are small, and so beneficiaries can only

purchase land as a collective, which leads to the formation of dysfunctional groups that are driven by the need to make up the numbers rather than to bring together individuals with the know-how, complementary resources and similar objectives. In addition, policy emphasises support for emerging farmers with their own resources and access to credit, while the lack of post-transfer support and the failure to integrate land reform into broader rural development is limiting the impact of policy on the rural economy (Lahiff and Cousins 2005). Other weaknesses that need to be addressed include the many commercially unviable projects, high transaction costs, scattered projects that do not meet people's needs, and inadequate infrastructure provision by provincial governments and municipalities (Deininger and May 2000). However, the adoption of an administrative route (where the state seeks negotiated settlements with claimants) rather than a court process saw the rates of restitution increased to nearly 18,000 in 2001/02 but per claim settlement dropped sharply from 432 in 1998 to 2 in 2002, and the number of hectares restored per claim dropped from 5,185 in 1998 to 8 in 2002. The majority of claims settled are individual household claims in urban areas through cash settlements while very few rural claims have been settled and most of the rural settlement land redistributed by the end of 2002 was in the semi-arid regions of the country (Ruth Hall Researcher 2004).

Tenure reform aims to provide farm dwellers and labour tenants with land of their own, it enforces property rights of ownership for people living and working on the farms who are among the poorest South Africans. These came at a time of wider changes in the sector which has led to hostility from land owners who hire temporally, evict and dismiss farm dwellers thereby entrenching dispossession by separating rural workers from access to land. With respect to communal areas there are no success stories since land administration has collapsed and there is widespread uncertainty about the status of land rights (Ruth Hall Researcher 2004). The current policy approach evidently has not met its targets, let alone restructure the rural economy. The argument that the current land reform is limited in its scale and objectives is justified. The first reason is the problem of big policy and the shrinking state, in that land policy bears little relation to the institutions, budgets and political environment in or through which it is to be realised (Ruth Hall Researcher 2004).

From Land Reform towards Property Rights

This debate surrounding land reform in South Africa exemplifies a wider approach in Africa as many African governments have chosen diverse strategies to distribute authority over land rather than focussing on the actual redistribution of land to individuals who are in need of land for livelihood. In

the development of land reform policies in Africa, there is a mistaken argument that a community is homogenous and the word 'Community' has been centrally placed in the resolution of land questions across the continent. Yet in practice, community is heterogeneous and consists of varied interrelations both vertical and horizontal: community can be influenced either explicitly or implicitly by vested interest (Sikor & Muñ Ller 2009).

The debate is further complicated with the emergence of community-based natural resource management with the focus on sustainable use of natural resource and the underlying debate on nature conservation and protection versus degradation and unsustainable use and management of natural resources (Sikor & Muñ Ller 2009). The question that arose, in the dialectics of nature conservation, who has the authority to protect nature, who makes decisions that are in line with global protocols, who developed legislation that finds resonance with global treaties--is it the state or community-- and how is the political construct of the nation state. All these debates lie within the framework of land reform and although current trends are in favour of community-led land reform due to the weaknesses identified in the state-led approach that has dominated the African continent, the inherent perception that community-led approach is free from government interference either explicitly or implicitly is a fallacy. How then do we shift our thinking in finding and developing a suitable approach that will deliver restitution/restoration of land to the African people, considering that community is not homogenous but heterogeneous and there are both vertical and horizontal interrelationships existing in a community is an ideological nightmare (Sikor & Muñ Ller 2009). Delgado (1999), argues that market reforms of structural change are needed to transform the sector and manifest in transactional costs of agricultural products but they are not sufficient. Delgado (1999), focuses his research on the 'how' to overcome transaction costs and increase access of smallholders to the assets, information, services and markets necessary to grow their incomes. Delgado (1999) further argues that the principal tool for reducing transaction costs is institutional innovation with property rights as a form of traditional *usufruct* rural people across Africa are relatively disenfranchised under political systems suggesting a tendency for policy disincentives to smallholder agriculture.

International policy on natural resource management has long experienced a paradigmatic shift from a state-led approach to community-based strategies and no major policy document fails to endorse a community-based approach to natural resource management. The term 'community' in natural resource management offers two important insights for debates on-the nature of 'community'. Social relations have turned out to be acrimonious due to divisive neo-imperial ideologies that are much too varied to fit into naturalising notions of communities as small spatial units, homogenous social structures, or social

groups sharing norms. In a community, there are multiple actors with different interests vying for economic, political, and cultural resources and these actors comprise of local actors as well as extra-local groups engaged in state projects, trading activities, and development work. The interactions among social actors may produce ‘community’ in the narrow sense if they attribute significant decision-making powers and benefits to collective actors reproducing, and generating social inequalities along economic, gender, racial lines (Sikor & Muñ Ller 2009).

Furthermore, ‘community’ has served a rapidly rising number of national and international civil society organisations as a powerful bloc to bring changes at grassroots level because it is an alternative to state-led approach to land reform which in most African countries exclude local people from decision making and deprive them from benefits that accrue from their resource environment. Following the concept of a nation state, ‘community’ should not be thought of in isolation from the state because the states command capacities and skills not available at the level of community. Nevertheless, community-led land reform will require states to be more reactive to bottom-up initiatives and more responsive to institutions and practices on the ground as arguments in favour of community-led land reforms find further support in a recent confluence in anthropological and economic thought about property. These two fields of study both suggest that property relations change in response to alterations in their political-economic ‘contexts’ thereby concurring that property cannot be excluded from social relations that exist within communities. Therefore, the proposition that property rights change as advancement in innovation and technological progresses and create conditions that establish not only economic relationships among actors within a community but influences who gets what and or under what conditions becomes key in this debate (Sikor & Muñ Ller 2009).

Changes in property occur by way of patterned shifts in property practices, as these make, modify, and unmake property relations in a process of constant negotiations and market forces. In defining the concept of abstract property, one should clearly evoke the notion of “abstract” versus “concrete property. While the former focuses on enforcement of legislations through court rulings and scholarly debates, the later deals with tangible objects such as land. Research by scholars has revealed differences in technological and economic factors that underlie the observed variation in property rights to land and the close connection between property and the state is not a universal relationship but is contingent on particular historical conditions that give rise to the nation state (Sikor & Muñ Ller 2009). It is also contingent on historical conditions that effaced the precolonial African states. If the nature of property rights to land depends on the context, then land reform needs to be responsive to the variety

of property arrangements on the ground and if property rights to land are sanctioned by multiple sources of authority, then land reforms cannot be the exclusive prerogative of the state but need to recognise community base institutions in the execution of land reform. These institutions may take on a wide variety of forms, such as village communities, lineages, clans and indigenous groups, yet together they attest to the significance of 'community' in processes of land reform and in an approach, land tenure systems will become adaptive to local conditions and changes over time rather than the local condition and environment adapting to land reform. The complex nature of land restitution, land redistribution and land tenure reforms therefore, generates the question on whether state-led land or community-led approaches have found resonance within the context of African society (Sikor & Mu" Ller 2009). The bifurcation between the state and community may well be inappropriate in the context of Africa.

Conclusion

There is evidence that the early African society valued co-operation. However, the concept of a co-operative as a distinct business entity originated in the early 1900 in Britain. In South Africa, the co-operative as a distinct business entity has been recognised in various legislation since 1912. However, before 1996 these provisions were intended to benefit White minority to the detriment of the Black majority citizens. The enactment of the Constitution led to the introduction of the Co-operatives Act. The Co-operatives Act recognises the need to promote the development of sustainable co-operatives, thereby increasing the number and variety of economic enterprises operating in the formal economy. The Co-operatives Act recognises that a successful co-operative movement in South Africa can play a major role in the economic and social development of the country. The Co-operatives Act also emphasises government commitment to providing support to enable co-operatives to develop and flourish, especially for black persons, women, youth, disabled persons or persons in the rural areas.

The introduction of the Native Land Act in 1913, which was a major step in dispossessing Black people of land, restricted the Black majority population from hiring or owning land in 93% of the land in South Africa. The land dispossession of the indigenous people of South Africa under the Native Land Act caused poverty which is still prevalent in our country today. Many South Africans, especially Black South Africans, are still trapped in a cycle of poverty that emerged as a result of our history of colonialism and apartheid; and land dispossession. The adoption of the Constitution and the property rights in terms

of section 25, required the state to secure the land rights of the black South Africans. All forms of property are protected, not only private property.

In a country where there is a high unemployment rate and the poverty levels are high, the land reform policy claims it can improve food security level and reduce poverty levels in rural areas. This claim is substantiated by the view that, making land available to the majority will enable people to grow their own crops and livestock resulting in improved flow of food and potential income from sale of surplus. This is supported by studies in Asian countries like India where land reform resulted in reduced rural poverty. One of the factors contributing significantly towards the success of land reform in Asia was that they were also more likely to access credit and invest in agriculture. However, in South Africa, several barriers to land reform exist, including limited fiscal allocations and institutional incapacity, and bureaucratised state procedures which lead to overspreading \corruption.

The current land reform policies based on section 25 of the Constitution underpinned by the market mechanism has not delivered its intended results of redistribution, poverty alleviation, income security and reduces inequality. While the debate rages on whether there should be a shift from the current form of land reform in South Africa to a new form, the focus should be to address the skewed ownership in favour of the majority who have been turned landless.

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Oil Discovery and Large Scale Land Acquisitions in Uganda: An Examination of the Implications for Livelihoods in Selected Oil Village Communities

Julius Niringiyimana, William Muhumuza & Murindwa Rutanga

Introduction

Oil is a *sine qua non* for the development of any country. The uniqueness and profitability of oil at the global level explains its lucrateness to global capitalism; shaping the interests of global powers to continuously scramble for African resources in different ways. The thrust of this study is to analyse the relationship between oil discovery and large scale land acquisitions by the state, Transnational Oil Corporations (TOCs) and wealthy business elites to explicate their impact on livelihoods for oil village communities in Uganda. This adds theoretical and conceptual knowledge on how oil wealth alters livelihoods and provides analytic and practical intervention for balanced development. Viewing the scenarios through the lens of “accumulation by dispossession”, this chapter is based on qualitative narrative method including in-depth interviews, focused group discussions and observations to collect data and conduct a content analysis to understand the relationships between oil discovery and Large Scale Land Acquisitions (LSLAs) and how they disrupt livelihoods in the oil village communities. Findings indicate that TOCs through the state acquired land for oil activities: oil refinery, pipeline projects, industrial park and oil waste processing plants. Others such as wealthy elites acquired land for speculation purposes. Thus, economic interests contradicted with community interests generating overwhelming implications for community livelihoods. These included human, economic, physical, social and cultural livelihoods issues in the Oil Village Communities (OVCs). This reduced ordinary people to ‘surplus humanity’. Hence, development actors should balance economic interests with other dimensions of development to realise inclusive development.

Although oil wealth has been applauded by various scholars for being a *sine qua non* for the development of any country because of its uniqueness and profitability (Shelley 2005; Venn 2002), its lucrateness to global capitalism has empowered global powers while disempowering local people in the oil producing developing states (Alao 2007; Byakagaba 2014). Backed up by mainstream theories and narratives of market liberalism, states are proving less

willing to accept anything more than voluntary standards in land acquisitions for capitalist oil projects, while institutions representing OVCs are increasingly disempowered or co-opted, and visions of social justice and equity sidelined (Sanyal 2007; Weeks John. 2014; Milanovic Branko. 2011; World Inequality Lab 2018). Thus, many states are reducing social spending, rolling back citizens' rights, while granting privileges and protections to the TOCs to access markets for the common land where oil has been discovered. These issues resonate with works by Stiglitz (2013); Terminski, (2015); Ferguson, (2006); Harvey, (2003); (2005); Bracking, (2009) and Hertz, (2001) which point out that states in the capitalist era tend to succumb and subscribe to the capitalistic policy ideologies whose interests and demands aim at expanding private enterprises and minimising social objectives. According to United Nations Research Institute for Social Development (UNRISD 2010; 2016), this has been made possible because of corporate capture of political processes and state institutions by neo-imperial powers.

Despite the fact that large scale land acquisitions in Uganda are historically rooted, the recent acquisitions in the oil village communities of Uganda have taken an oil dimension. This is because they are acquired for oil infrastructural development projects including oil refinery, pipelines, central processing facilities and oil waste processing plants (Land Acquisitions and Resettlement Framework 2016; Byakagaba 2014). Other huge chunks of land are "acquired" by wealthy individuals for speculative purposes whose main interests are profit making and capital accumulation from oil compensations. However, as Watts, (2012) argues, these oil projects are inattentive to the needs of local peasant-pastoralists. This is because local residents from OVCs suffer from sharply increasing land prices, short notice evictions from owners selling land to speculators and large scale evictions without adequate, fair and prompt compensation as land is given over to the construction of oil capitalist facilities (Wakiko 2018). In the worst cases, citizens without clear land titles, are forcefully removed and become internally displaced persons. Thus, transnational economic interests contradict with community livelihood interests, reducing ordinary citizens to what Sanyal (2007) calls 'surplus humanity'.

It can be argued that although the World Bank (2015: 27) estimates that the development of oil industry and increased public investment will help Uganda reach its goal of US Dollars 1000 GDP per capita by 2030, these estimates are questionable. The Internally Displaced Persons (IDPs) resulting from massive short-notice community evictions taking place in the Oil Village Communities (OVCs) to create space for oil capitalist projects indicate red flags on whether or not 1000 GDP per capita for Uganda will be achieved.

In its historicity, oil exploration in Uganda dates back to the early 1890s but the first natural oil seeps were discovered in the 1920s (Vokes 2012). Although

world wars, political instabilities and governments' low prioritisation of commercial oil production delayed massive explorations, the global high demand for oil wealth in recent years in Africa, could not leave Uganda's oil unexploited. Consequently, due to increased Transnational Oil Corporations (TOCs) in Uganda, aided by neo-liberal development policies, commercially viable oil was confirmed in 2006 in Uganda's Albertine region (Government of Uganda 2006; Vokes 2012; The Parliamentarian Issue One, 2-12; Kashambuzi 2010).

Albertine region has been referred to as 'Oil Village Communities (OVCs) in this chapter. By oil village communities (OVCs), we mean 'the local people affected by oil exploration and production activities in the Albertine region'. Oil village communities also depict a common identity within a village community due to the common residence; a common economic activity; a shared history and heritage; cross-cutting ties of neighbourhood, friendship, kinship and a common religious creed. The concept may also denote the membership of village community in terms of physical residence in a village and subscription to village social norms' (Frynas 2000; Ndubuisi 2012). Thus, OVCs denote a cluster of 'traditional village communities in the Albertine region who are affected by oil exploration and production activities'. Therefore, Albertine region will be used, in this chapter, interchangeably with OVCs where appropriate. OVCs in Uganda (Albertine Region) form the northernmost part of the western arm of the East Africa Rift System. It stretches from the border with South Sudan in the north to Lake Edward in the south and extends into the Democratic Republic of Congo. It covers a total of 67886 square kilometres and consists of ten districts namely; Hoima, Buliisa, Masindi, Nwoya, Kabarole, Kasese, Ntoroko, Bundibugyo, Kanungu, Nebbi and Amuru (Ministry of Energy and Mineral Development 2015).

The recent appraisals of 21 oil wells in the Albertine region indicate that oil materiality, stands at 6.7 billion barrels of oil reserves from 3.5 billion barrels that were available in 2013 (MEMD 2015). The blocks in the Albertine Graben in Western Uganda were initially jointly licensed to Anglo-Canadian, Heritage Oil and the Anglo-Irish company, Tullow Oil. Heritage sold their stake to Tullow for US\$ 1.5 billion, after which Tullow brought in investment from two bigger players, Total and the China National Offshore Oil Corporation (CNOOC), each of which agreed in 2011 to pay US\$ 1.45bn to split the area three ways (Vokes 2012; Wass and Musiime 2013). Thus, the present key TOCs in Uganda's oil sector include China National Off Shore Oil Corporation (CNOOC)-China, Total E&P-France and Tullow Oil- Britain. Notwithstanding this, there are also domestic actors in Uganda oil stakeholders. They comprise the state through various Government agencies, the President and some military leaders, transnational donor agencies, parliament and Civil Society

Organizations (CSOs) as well as private wealthy individuals on the one hand and the host community members on the other hand. These various actors have varying interest to gain from the oil bust and boom opportunities. They employ various technologies of power to maximise from the oil wealth. According to Watts (2012), it is these actors, agents, and processes that give shape to our contemporary iteration of oil capitalism. Again, it is these processes in which vulnerable groups such as women, the elderly and children are dispossessed and alienated from their customary land tenure rights in order to pave way for the transnational corporations' exploitation of oil wealth and maximisation of economic interests.

The relative power of these actors, vis-a-vis the ruling coalition helps explain the nature of negotiations over "acquiring" land for oil capital development. McMichael (2012) and Welford *et al* (2013) posit that the role of the state centres around attracting "investors", triggering, mediating, negotiating or regulating land "deals" for oil activities. The state is also ideally responsible for identifying the best oil companies and negotiating with them for oil "deals" as well as creating favourable oil "investment" atmosphere. On the other hand, TOCs, provide financial (recoverable costs), technological and expertise support in the oil sector. To maximise profit, TOCs also form joint venture partnership or buy off other oil companies. In 2011, for example, CNOOC and Total signed sale and purchased agreements with Tullow, agreeing to pay US\$ 2.9 billion for interests of one third each in blocks 1 and 3A (Ojumbo 2013; Bloomberg 2015). While the state is responsible for creating conducive business environment for the TOCs, it should not sideline its social contract with the citizens who need to own, control, participate in and benefit from oil development projects.

However, evidence indicates that oil producing states supplant meaningful spaces of civic engagement with divisive populist rhetoric. In Uganda, for example, Production Sharing Agreements (PSAs), for oil have been kept with highest level of secrecy and guarded with utmost security apparatuses. For example, until November 2009, the content of the 2007 Production Sharing Agreements (PSAs) remained a closely guarded state secret. *The Platform*, an NGO based in London, obtained the contracts clandestinely and lodged them on to the internet, dubbing them, *Cursed Contracts* (Lay and Minio-Paluello 2010). Again, OVCs have been dispossessed on a short notice without adequate and fair compensation (Patey 2015). According to Sanyal (2007), in capitalist development, commercial and economic interests have tended to supersede all other national interests. This echoes what Hertz (2001) notes: "the business is in the driving seat, corporations determining the rules of the game and government acting as referees, enforcing rules laid down by others". In such capitalist ideological conditions, states tend to dance on the tunes played by TOCs to favour capitalistic interests while marginalising and subordinating

ordinary citizens. Thus, instead of acting as a check on TOCs, governments are now romancing them, and acting less as ‘night watchmen’ and ‘sales men’, promoting the fortunes of TOCs (Weeks John 2014).

Based on this backdrop, this chapter aims at analysing the relationship between oil discovery, large scale land acquisitions (LSLAs) and their implications for community livelihoods in the OVCs. To adequately understand the relationship between these variables, it is theoretically imperative to reflect on “accumulation by disposessions” by (Harvey 2003). This is because enhanced enclosure of former communal lands and dispossessing subsistence farmers and pastoralists of their land in order to accelerate the expansion of oil capitalism is highly interconnected with accumulation by dispossession (Harvey 2003). According to Hall (2013: 1583) accumulation by dispossession is “the process by which land and other resources are enclosed, and their previous users dispossessed, for the purposes of capital accumulation”. Apart from economic interests and Euro-modernist reasons by which the livelihoods of OVCs are disrupted through the transfer of land to the “investors”, enclosure hinges at the practice of detaching community members from their culturally embedded land ownership and use patterns.

Research Methods Employed

Methodically, this study was based on qualitative narrative method and data were collected using documentary reviews, in-depth interviews, focused group discussions (FGDs) and first-hand observations from Hoima and Buliisa districts. These areas were selected because that is where oil resource is mainly found with various oil infrastructural developments that have resulted in increased land value and LSLAs. Qualitative approach was used to explore the scenarios in OVCs through interacting with and interpreting the processes in which land was being “acquired” by various oil actors. Qualitative approach draws from phenomenology which enabled the researcher to describe the meanings of the lived experiences for the individuals in the OVCs (Creswell 1998). Therefore, the complexity that underlies oil discoveries and land grabs in the oil village communities required qualitative research to obtain in-depth knowledge on the relationship between oil explorations, land grabs and community livelihoods in the OVCs.

The rest of the chapter is systematically organised in the following sections: it starts with introduction in which the problem, objectives of the study as well as the materiality of oil wealth and oil actors are articulated. This is followed by explications of the global large scale land grabs and the theoretical and conceptual reflections. The next section analyses land tenure systems and the process of land commodification in Uganda. This aimed at understanding how

the current market-based land laws and policies no longer support those owning land communally and the need for land commoditisation, which is an enabling factor for LSLAs. This was further elaborated under the theme: caught between two competing epistemologies, where the states' desire to commoditise land for LSLAs has been analysed. In the next section, we analysed oil-related large scale land "acquisitions" in the oil village communities, implications for the community livelihoods and challenges of oil-related land grabbing processes.

The Global Large Scale Land "Acquisitions": Conceptual and Theoretical Reflections

Over the past several decades, the convergence of neo-imperial crises in food, energy, finance, and the environment has driven a dramatic increase in land commodification and neo-imperial large scale land theft in Africa. Borras *et al* (2011) demonstrate how powerful transnational and national economic actors from corporations to national governments and private equity funds have searched for 'empty' land often in distant countries that can serve as sites for fuel and food production. This is occurring globally and neo-imperially but the land of the Global South is increasingly perceived as sources of alternative energy production, food crops, mineral deposits and reservoirs of environmental services. These studies further explain how national governments have looked inward and resulted into what is often termed as 'internal colonialism' whereby land seen officially as marginal or 'empty' is set aside for commodity production. This internal colonialism is precipitated and fortified by neo-imperial exigencies. Thus, the pace and extent of this land theft has been rapid and widespread.

According to Cotula *et al* (2010), land "acquisition" is defined as not only the purchase of "ownership rights, but also the acquisition of use rights, for instance through leases or concessions, whether short or long-term..." Daniel and Mittal (2009) posit that Large Scale Land Acquisitions (LSLAs) refer to the purchase or lease of vast tracts of land by wealthier, food insecure nations and private "investors" from mostly poor, developing countries in order to produce crops for export back to their home countries. This definition is based on the growing interest in large scale land "acquisitions" by food insecure "investor" countries for food production that always appear as government-backed "investments" especially in developing countries. However, while it is true that the transnational corporations common in developing countries in search for land for food production are from global powers, this chapter adds that they don't only scramble for fertile land necessary for food production, but also land with minerals and oil reserves. Oil wealth being at high global demand and lucrative in nature, attracts global powers that seek to realise energy security and

maintain their hegemonic powers over Africa. The conceptualisation of land “acquisition” is also in neutral term, yet, what is actually happening in Africa is theft of African land through different processes including land grabbing rather than mere “acquisition” (Zoomers 2010; Mabike 2011). Therefore, as Warikandwa, Nhemachena, & Mtapuri (2017) elucidate, it is plausible to argue that these neo-imperial states are not necessarily “investor” nations, merely “acquiring” land, because they come to Africa not to “invest” but to steal and rob Africans of their resources. They use “acquisitions” and “investments” ideologically, to hide the land grabbing, robbery and theft that is happening in developing countries. For the purpose of this chapter therefore, large scale land “acquisition” means the processes through which vast tracts of land are purchased or leased by transnational oil corporations in support of their neo-imperial hegemonic states for the purpose of exploiting and benefiting from oil wealth in the oil village communities.

Although the exact amount of land that has been “acquired” in Africa is not explicitly known, some literature has come up with some estimates. The International Food Policy Research Institute (IFPRI) suggests that roughly 20 million hectares of land exchanged hands between 2005 and 2009 (Von Braun and Meinzen-Dick 2009). The World Bank Report (2010) also estimates this global phenomenon at 45 million hectares. The Report explains how African countries hosted 70 percent of the demand for land between 2008 and 2009, with Sudan, Ethiopia, Nigeria, Ghana, and Mozambique accounting for more than 23 percent of projects worldwide. In 2010, it was estimated that between 51 and 63 million hectares have been transferred in 27 Sub-Saharan Africa countries over the last few years (Friis and Reenberg 2010). Latin America (Brazil and Argentina), follows the trend with 21 percent of all project investment in 2008–2009, followed by Central Asia with 11 percent and Southeast Asia with 10 percent respectively (World Bank 2010).

This resonates with Cotula *et al.*'s (2009) explanation that Africa South of the Sahara is the site of the most speculative major land “deals”, including one thwarted “deal” in Madagascar that brought down the government. In Ugandan perspective, commercial land “deals” involving transnational corporations or states were thought to account for about 15 percent of agricultural land in 2007 (Friis & Reenberg 2010). However, in 2009 alone, the Ugandan government “leased” an estimated 2.2 percent of the country's total land area (Martiniello 2012). Statistics from the Land Matrix, a public database, have shown that between 1000 and 40,000 hectares have occurred in Uganda involving mainly European companies, major global financial players such as World Bank with Ugandan government through joint ventures (Martiniello 2012; Serwajja 2012). This resonates with a study conducted by the Centre for Basic Research (CBR) (2014) which indicated gradual increase in LSLA overtime. Kanyesigye (2015)

indicates that in a period of four years (2006-2009), only (17 percent) of “investors” acquired land on large scale but from (2011-2013), LSLAs increased to 57 percent. The study revealed that the main areas affected were Karamoja (47.7 percent), followed by Acholi (45.5 percent), central (3.6 percent) and Albertine region (2.4 percent).

The implications of these LSLAs have been met with mixed reactions from different scholars and actors regarding their consequences to the lives and livelihoods of the rural poor. For Borrás *et al.* (2011) and Borrás (2010), they explain how some actors view LSLAs as an economic opportunity for the rural poor. Others like Musiime & Womakuyu (2012) however, wary of corruption that shrouds land “acquisition” processes. They, for example, show how villagers in Kasenyi, Buliisa District, Uganda ‘were beaten up by hired thugs and detained by police . . . after contesting the fraudulent sale of community land, including a plot where Tullow Oil’s Kasemene-3 well is located. The implications these land thefts have on the community livelihoods resulting from short notice massive community evictions to create space for oil exploitation and production in the oil village communities need further scholarly investigations.

The World Bank Report (2010) seems to incorporate the two contradicting positions. While it recognises economic opportunity that may accrue from the so called LSLA, it is on the other hand conscious about the negative outcomes that may accrue from the resource plunder in developing countries. In this chapter, we argue that there are fallacious aspects in this World Bank Report. On one note, the Bank clearly shows that land “Acquisition” have taken place largely in places where buyers could exploit corrupt or indebted governments with little ability to regulate the transaction or prevent “buyers” from targeting the poorest rural communities, evicting people with non-traditional land title from their land. The Bank also provides seven guidelines and principles for responsible “investment” to help correct the deficiencies of land “acquisition”. Some of these principles include, the expectation that new “investments” recognise and respect existing rights to land and natural resources, as well as generate desirable social and distributional impacts. If these principles were to be adhered to, the curse of dispossessions would be reduced in areas where LSLAs are needed including the OVCs. Although the report was concerned with agricultural “investment”, it is plausible to add that the neo-imperial crises of oil reserves have equally contributed to the global LSLAs in such countries. The set of principles, outlined are also not embedded in a political analysis of how they might actually work in practice. In the end, while comprehensive, the World Bank Report (2010) does not acknowledge the fact that having no formal land titles should not be the basis for the neo-imperial land grabbing in African states. In any case, customary land ownership has been existing for long with

land holders living in harmony. Therefore, the formalization process of land is ideologically synchronized to facilitate neo-imperial plunder of African resources.

Specifically, although some of these studies explain how large scale land “acquisition” affects community livelihoods in developing countries, they are theoretically focusing on how such global powers struggle to access land for food production in order to maintain their hegemonic powers. Such studies hardly explain the centrality of oil discovery in increasing large scale land “acquisition” and how these processes reduce community members to ‘surplus humanities’ through dispossessing them of their livelihood safety nets. . These studies hardly explain the linkage between new resource discoveries such as oil to large scale land “acquisitions”, yet new tracts of land are being acquired in search for oil to feed industries and transportation sector of the neo-imperial powers. Doss *et al.* (2014) and Uganda Land Alliance (2011) articulate how oil discovery has instigated the new wave of scramble for land in the Uganda’s oil village communities and enhanced the enclosure of former communal lands for petroleum economic interests. In the process, societies engaged in subsistence farming and pastoralism have been expropriated from their land in order to accelerate the expansion of oil capitalism.

Based on the evidence above, there is a clear connection between oil exploitation, large scale land “acquisition” and disruption of community livelihoods that needs conceptual and theoretical analysis. As Harvey (2003) argues, the interconnectedness between the three variables centres on capitalism since capitalist extractives are characterised by enclosures, accumulation by dispossession, theft and robbery (Hall 2013). This resonates with Polanyi’s work (1944), on “*The Great Transformation*” and his followers such as Harvey (2003; 2006); Cohn (2012); Sanyal (2007) and Hertz (2001). These scholars explain the different ways in which capitalistic projects tend to rob, steal, marginalise vulnerable communities, legitimise exploitation, worsen social and economic inequalities, accumulate capital by dispossession and challenge the existing local institutions. Hertz (2001) and Sanyal (2007) on their side, explain how such development projects consider social justice to mean access to global markets and majority of the population reduced to “surplus humanity”. As Chomsky (1999) posits, such capitalistic development projects place “profit over people”. Indeed, short notice evictions, dispossession without compensation, theft and enclosure of OVC land, are clear indications of the validity of Chomsky’s assertion.

Thus, instead of explaining specific stand-alone phenomenon through the current collection of forces such as food crisis, biofuels and oil resources, LSLAs, should be seen as a logical component of the long-term evolution of the neo-liberal market economy. The insights that Harvey (2003; 2010) and Sassen

(2011) provide on “accumulation by dispossession” provide a clear understanding on how oil discovery configures with LSLAs and how the vulnerable groups are systematically robbed, displaced and dislocated from their source of livelihoods.

Land Tenure Relations and the Process of Land Commodification: a Precondition for LSLAs in Uganda

The Republic of Uganda recognises four land tenure systems. These are customary, freehold, *mailo* and leasehold land tenure relations (The Republic of Uganda 1995:148). Of these types, while *mailo* and freehold can easily be commodified, customary is not, yet it is not only the commonest in Uganda’s oil village communities. It is not easy to commodify because of lack of land titles by those who occupy it and the expensive nature of the processes of accessing such services. Through in-depth interviews conducted in Kabaale parish in Hoima District, most key informants confirmed that processing a land title can cost between two to three million Uganda shillings, which most residents do not have. The informants say it is expensive not only because of various stages involved but also the corruption involved in the system. These tenure systems are explained in detail below.

Customary Land Tenure System

Customary tenure is defined in the Land Act of 1998, as a tenure category that is applicable to a specific area of land and a specific description of persons governed by rules generally accepted as binding and authoritative in that community. The rules governing customary tenure include communal ownership of land (The Republic of Uganda, 1998). The Land Act provides that customary land tenure may be converted to freehold by individuals, families or communities on application to a District Land Board. MLHUD (2010) and Terra Firma (2011) indicate that roughly 69 percent of all land in Uganda falls under customary tenure and much of this land is in the north and east of the country. However, Rugadya (2005) shows four concerns that these incidents do not clearly define the essential characteristics of customary tenure. First, access rights to land are a function of community, lineage and family membership. Second, access to land is specific to a function or group of functions. Third, allocation of land and control of its use are part and parcel of community governance. And fourth, trans-generational rights to land are protected.

The Act establishes Certificates of Customary Ownership (CCOs) which constitute proof of ownership and provides for the establishment and management of Communal Land Associations (CLA) but these have not yet been issued and embraced in the whole country. During the field work, the

secretary of District Land Board (DLB) of Hoima District confessed that CCOs are inactive in the district. He said:

... while we recognize that CCOs and CLAs are important in this area where most land is customarily owned; it is currently inactive because we do not have funds to run these delicate activities.....We requested for training support from the Ministry of Lands, Housing and Urban Development since 2015, but no response has been issued from them. IDI, Hoima District Land Board, 12th March, 2018.

Thus, while land is being acquired for oil activities, there is limited institutional support for the local people whose land is customarily owned. This weakens people's ability to protect their land. These issues validate studies conducted by Kigula and Nuwagaba (2005) and Rugadya (2006). They explain how CCOs change into freehold titles without recognising the difficulties of converting concepts of customary ownership into modern titles and the financial and cultural barriers that may disfavour some categories of local people. As these scholars demonstrate, formal procedures concerning the formation and operation of the CLA are too involving and require a reasonable degree of literacy and "external" assistance in terms of provision of information and guidance. Reflecting on women vulnerability, for example, around 28 percent of women in the OVCs are estimated to have attended tertiary institutions. Findings also reveal that there are other cultural barriers in oil village communities that hinder women from participating in decision making processes (CREED 2014). All these factors combined, women may not be able to juggle successfully in the whole process of converting customary land into formalized land tenure relations in order to fairly benefit from the oil wealth opportunities.

***Mailo* Land Tenure System**

In regard to *mailo* tenure system, land allotments to the Kabaka and his chiefs following the 1900 Buganda Agreement were its major composition. The term "*mailo*" is derived from the measurement of these land grants in square miles. The Land Act 1998 (Section 3(4)(b)(c)) also recognises the usufruct rights of tenants, known as *kibanja* (pl. *bibanja*). Both the Act and its 2010 Amendment uphold the rights of *mailo* tenants (*bibanja* holders) and limit the powers of *mailo* owners to make land management decisions without the consultation and consent of *bibanja* holders (Terra Firma 2011). In practice, however the relationship between *mailo* tenants and owners has been interpreted in different ways that reflect a long history of unequal power relations (Terra Firma 2011).

Mailo tenure is found in the central region and parts of western Uganda and covers some 9 percent of the land in the whole country (MLHUD 2010).

There are however some implications on *mailo* tenure such as excluding the rest of the population from enjoying similar rights in land as those of the Kabaka and his chiefs. Batungi (2008) and Okuku (2006) agree that the population is not only deprived of the rights of ownership but also the rights of occupancy. The rest of the population does not possess security of tenure and property rights in addition to payment of *busulu* and *envujjo*. In addition, ownership of land remains an exclusive right of the privileged by birth or because of financial endowment (Mafeje 1973; Batungi 2008). However, the restoration of *mailo* tenure by the Land Act raises a major problem with regard to registrable interest. Registrable interest is intended to facilitate interaction between tenants and landlords. It ensures that the landlords do not evict tenants as they wish. Nonetheless, to have a registrable interest necessitates a certificate of ownership. As Batungi (2008), Okuku (2006) and Rugadya (2009) analyse, it is contradictory to issue a tenant a certificate of ownership when an absentee or available landlord has a land title. This creates overlapping claims for the land with negative consequences for the definition of property rights and creates unnecessary burden, which leads to land conflicts and gender inequality.

Freehold Land Tenure System

Freehold “involves the individualisation and holding of registered land in perpetuity or for a period less than perpetuity which may be fixed by a condition” (The Land Act 1998, Section 3(2)(a)). It provides the holder with full rights to use, develop, transact, or dispose of the land (Section 3(2) (b)(i-iv)). Holders of freehold land are eligible to register their rights through a freehold title (Section 3(3)). Freehold tenure represents about 18.6 percent of all land in Uganda (MLHUD 2010; Ingrid 2013). Some proponents of these land tenure systems argue that the individualisation of land tenure increases tenure security of the landholder. This, as a result, gives farmers access to credit, reduces fragmentation of land holdings, and reduces conflict over land, hence freeing up resources which would have been used for litigation (Platteau 1995). Nonetheless, these assumptions raise a number of issues that make the correlation between title and long-term investment problematic. Land markets may not necessarily be activated as a result of registration/titling. As Okuku (2006) explains, the mere fact that land sales take place does not mean that they promote economic efficiency by transferring land into the hands of “dynamic” cultivators. This echoed Platteaus’ (1995) evidence from Kenya where land reform process indicates that ‘those purchasing land did so for the sake of speculation, future security for their sons and cash borrowing power (Okuku 2006; Ingrid 2013).

Leasehold Tenure

Leasehold is created by contract or by law that describes the relationship between a landlord (lessor) and a tenant (lessee) (The Land Act 1998, Section 3(5)(a)). It is usually limited to a specified time period and may be subject to rent (Section 3(5) (c-d)). Leasehold tenure essentially confers freehold rights to both the landlord and the tenant “subject to the terms and conditions of the lease” (Section 3(5)(e)). Leasehold tenure accounts for just 3.6 percent of land in Uganda; some of this land falls within the *mailo* areas (MLHUD 2010, Terra Firma 2011). Leasehold is usually offered to foreigners because by the law, they cannot own land in Uganda—they can only acquire leasehold rights to land (Land Act of 1998, Section 40 (1)). A noncitizen of Uganda cannot acquire a lease exceeding 99 years (Section 40 (3)), and all leases of at least five years acquired by noncitizens must be registered in accordance with the Registration of Titles Act (Section 40(2)). By law, noncitizens are not eligible to acquire or hold *mailo* or freehold land (Section 40(4)).

Caught Between Two Competing Epistemologies: Customary Land Tenure and the States’ Desire to Commoditise Land for Large Scale Land “Acquisitions”

In the study entitled “Common Ground: Securing land rights and safeguarding the earth” conducted by International Land Coalition in 2016 indicates that up to 2.5 billion people (including 370 million indigenous people) depend on land and natural resources that are held, used or managed collectively worldwide. These people protect more than 50 percent of global land surface but they legally own just 10 percent globally. This leaves a third of the world’s population vulnerable to dispossession by more powerful actors.

This is not new in Uganda. In the Constitution of the Republic of Uganda, Chapter 15 (Land and Environment), Article 237 clause one states that: “Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution” (The Republic of Uganda 1995:148). It also states that “all Uganda citizens owning land under customary tenure may acquire certificates of ownership”. It also states that; “land under customary tenure may be converted into freehold land ownership by registration” (The Republic of Uganda 1995:148). After three year of Ugandan constitution, a land Act was adopted by the Republic of Uganda in 1998. The Land Act underpins the Constitution in the recognition of customary tenure systems, and it lays down the ground workings of land management in Uganda. The main goal of the chapter regarding land and environment in the 1995 Constitution together with the Land Act of 1998 is to improve tenure

security of the nation, and start the work towards a formalised system. This process leads to land commodification.

In the Special Economic Zones (SEZs) like Uganda's oil village communities, the reconstituted land interest resulted into land speculation by actors that did not have prior interest in the land before oil exploration and added pressure on the local residents to register their lands into freeholds. In its study, CRED 2014, found out that 76.6 percent of land in the oil village communities of Uganda was held in customary private land tenure systems while 21.1 percent was held in customary communal ownership. Acquiring land in such context is complex since everyone in the specific community derives livelihood from the same land and thus claims a stake on that land. This perhaps explains the reasons for the increase in land registrations in the OVC after oil discovery. During the fieldwork in March, 2018, the researcher found out that 2007 alone, Hoima district received 945 applications, compared to zero from 2001 to 2004 and 19 in 2005. Due to oil discovery therefore, land that has been customarily owned became highly attractive making communities, awakened by oil explorations, to view their lands in new lenses—hence strengthening pre-existing land attachments, while creating new forms of attachment to land.

Considering the general interests in land registration in Uganda, Mamdani (2012) stipulates that by recognising all different systems of land rights in the country, the government aims to effect a step by step process to implement a formal system of freehold and leasehold in Uganda, over time. The condition to have CCO of land, and later convert it into freehold has serious implications. For one, it implies that the government's plan is to softly unify the system by recognising the nation's diversity of tenure systems, and over time convert the systems into a formalized freehold system. Several studies including those of Mamdani (2012); Mitchell (2007) and Martiniello (2015) are concerned with this kind of land tenure conversions. Mamdani (2012) explains that the 1998 Land Act's aim of recognising customary land tenure must be seen as the latest phase in the modern state's endeavour to colonise society. Martiniello (2015) adds that identification and mapping of land under customary forms of tenure through geographical information systems (GIS) and digitalised cadastral services is not aimed at protecting customary rights but at extending state control over people and territory. This will eventually eliminate or convert these rights and actively promote the formation of a class of politically connected businessmen. These ideas echo what Mitchell (2007) asserted: 'the creation of formal legal title is a mechanism for transferring properties from poorer urban and rural classes to more affluent ones, and concentrating ownership in fewer hands'. Therefore, while just 17 percent of land in Uganda is held under freehold (World Bank 2012), the state is expanding its efforts to consolidate its physical basis, enhancing territorial control over populations and actively promoting the

formation of a class of politically connected businessmen (Mamdani 2012; Martiniello 2015).

The American Ecologist Garrett Hardin in his study “*The Tragedy of the Commons*” narrative, cast a shadow over communal tenure as unsustainable and untenable with development processes (Hardin 1968). Hardin demonstrates that as population increases, unclear ownership of common pool resources inevitably results in overexploitation and degradation as each user acts in self-interest to maximise personal benefit. He contends that land reform to transform communal tenure into formal, individualised ownership would work better. Some scholars such as Grafton *et al* (2000) and De Young, have gone ahead to quote the philosopher Aristotle “*That which is common to the greatest number has the least care bestowed upon it*”. The system and institutions of communal land ownership often characterised as not static, dynamic and evolving (Cousins 2009) is criticised and perceived as the problem rather than the cure to security of tenure in developing countries (De Soto 2000). Based on these narratives, most African countries have implemented policies that promote commoditisation and individualisation of land (Benjaminsen *et al* 2003) with total disregard for the cultural context enshrined in customary land tenure systems that are relevant in shaping the identity and promoting livelihoods of local communities.

On the contrary, however, Reed *et al* (2007) and Sjaastad *et al* (2009) explain that there is an increasing recognition of the rights of local communities on communal resources in many parts of the world today. They demonstrate how various policy analysts have found individual land titling not to be the most appropriate form of protecting these rights of the community members. They argue that the shift from over-emphasising private rights to customary rights is in recognition of the rights of local people to self-determination. Cousins *et al* (2004) for instance shows how communal land tenure system implies that the community has control over the land in determining allocation of land for residence, cropping and rights of access to the common property resources. Thus, policies that promote security of tenure for the local people often result in enhanced livelihood options for the poor, equity, social justice, preservation of natural resources and environment, peace and stability. On the other hand, policies and practices that undermine security of tenure of community groups breed vulnerability, injustice, conflict and can hasten gender inequality. These arguments are validated by Karl Polanyi (2001) assertion: “What we call land is an element of nature inextricably interwoven with man’s institutions. To isolate it and form a market for it was perhaps the weirdest of all the undertakings of our ancestors”. Thus, separating people from land where their source of livelihoods has been obtained has become a serious contributory factor to poverty, inequality and marginalization in oil village communities of Uganda.

Therefore, as Sjaastad *et al* (2009) demonstrate, the narrative of the *tragedy of the commons* may only arise when communities fail to exclude potential outsiders from common-pool resources. Nonetheless, it is increasingly becoming clear that communal tenure remains legitimate and relevant in the modern world (Cousins *et al* 2004). Some resources can only be used communally. These include landing sites, communal grazing grounds, watering points, cultural sites among others. The key issue, however, is how to effectively engage and support the community governance structures and thereby increase security of tenure. The failure by community groups to formalise their tenure status has made them vulnerable under the hard conditions of market economy. This resonates with what is happening in the oil village communities of Uganda where oil and gas exploration and development are currently taking place. In the oil village communities, local citizens especially women are losing land rights to land speculators (CRED 2014). Communal land is often viewed as “free land”, “open access” and “land that is free for acquisition”. Consequently, due to ignorance of the community members on their rights on land, customary land holdings are being titled as freeholds without the consent or knowledge of the customary owners (CRED *et al* 2015). The outcome is that they are denied their right to the royalties that accrue from natural resources on their land. This demonstrates a disconnect between the provisions of the law that provide for protection of customary tenure rights on communal land and the reality on the ground. This is validated by the findings from Human Rights and Peace Centre (2017) that showed concerns of the dearth of knowledge on the applicability of existing legal frameworks in ensuring security of tenure rights over communal land at community level and local elites in connivance with a section of bureaucrats who take advantage of this situation.

Mechanisms for Land “Acquisitions” in Uganda

Currently, there are two primary mechanisms through which “investors” can acquire land for “investment” in Uganda: through direct negotiation with private land owners (possibly with government facilitation) or through the acquisition of government land held by various agencies, including the District Land Boards, the Uganda Land Commission, or the Uganda Investment Authority. With private land “acquisition”, “investors” can purchase (domestic investors only) or lease (domestic or foreign “investors”) land through direct negotiation with private land owners (US DOS 2011). “Investors” are further required to compensate lawful occupants for improvements on the land (UIA 2012). Compensation procedures for land acquired by the government are regulated by the Land Acquisition Act of 1965; however, it is not clear that any legislation regulates compensation where private “investors” “acquire” land

directly. Although the UIA helps “investors” determine which occupants are ‘bona fide’ or ‘lawful’, it posits that dealing with customary land is typically unattractive to “investors” because it lacks title and is not surveyed, making it ineligible for use as collateral with banks (UIA 2012). It also argues that since customary land is governed by the “unwritten, customary laws” specific to the area, it is difficult for “investors” to identify legitimate holders of customary land.

On the other hand, “investors” can also lease land held by various government agencies, including the District Land Boards, which are authorised to hold land on behalf of local governments, and the Uganda Land Commission (ULC), which, according to section 49(a) of the Land Act, is authorised to “hold and manage any land in Uganda which is vested in or acquired by the government in accordance with the Constitution” (UIA 2012; ULC 2012). However, a limited number of “investors” have “acquired” lands directly held by the Uganda Investment Authority. What is troubling also is that there is currently no enabling legislation that specifies the procedures for any of these agencies to allocate land to “investors”. There is also no legal definition of “public”, “government”, and “local government” land, which makes it difficult to determine which agency has authority over a given parcel of land (Bogere 2011).

While these challenges for “acquiring” land have been raised, some of them are not tenable in African customary law context. First, it is unrealistic to front land titles, Geographical Information Systems (GIS) and land surveys as the only solution to help solve land problems in Africa. This is because land that is customary owned in Africa is regulated by the customary African laws and people are entitled to the land based on such customary laws. Since they are entitled to the land, it means that they have land titles and such arrangements have been like this since precolonial eras (Batungi 2008). Secondly, if precolonial Africans had universities like Timbuktu, University of Sankore and so on in which there was reading and writing, why must we assume that pre-colonial African laws were unwritten? It is plausible to argue that colonialists and later (neo)-imperialists are ideologically using concepts such as titles, surveys and GIS as a mechanism to destroy pre-colonial legal and jurisprudential African archives. There are also important on-going debates about the authority of the government to compulsorily “acquire” land for the purpose of allocating it to “investors”. The Constitution (Section 26(2)(a)), the Land Act of 1998 and the Land Acquisition Act Cap. 226 of 1965 prohibit the government from using compulsory “acquisition” to promote “investment”. The government has tried to overturn these provisions, including most recently National Land Policy 2013. However, its attempts to include the authority to use compulsory “acquisition” for “investment” promotion in the Draft National Land Policy were rebuffed by stiff opposition from civil society and communities consulted

on the draft document (NGO A 2012; NGO B 2012). As a result, the final National Land Policy (2013) prohibits compulsory “acquisition” for private “investment” (MLHUD 2011).

The government returned to the same issue in 2017 to change article 26 of the constitution and the President moved across the country sensitizing the amendment on different social media channels. Finally, on July 11, 2017, Uganda’s Attorney General tabled in Parliament a Bill to amend Article 26 of the 1995 Constitution (as amended) to the effect that the Government can legally displace communities anywhere in the country without prior payment of fair and adequate compensation to the victims (Bwengye 2017). The argument in the bill was that the Government should have powers to acquire any land anywhere in the country, including protected areas and no one should have a legal right to challenge such decision on acquisition. The bill reads:

Where the owner of property or any other person having any interest in or right over property objects to the compensation awarded under the law made under clause (2)(b), the Government or local government shall deposit with court for the property owner or any other person having any interest or right over property, the compensation awarded for the property and the Government or local government shall take possession of the property pending determination by the court of any dispute relating to the compensation (Bwengye 2017).

Key Oil Activities and Large Scale Land “Acquisitions” in the Oil Village Communities

Favoured by the neoliberal development policies, land in the oil village communities has been earmarked, accessed and controlled by Transnational Oil Corporations (TOCs) and private wealthy individuals. The key oil activities which have necessitated the “acquisition” of land for oil developments in the Albertine region include among others oil refinery project in Hoima District, Central Processing Facilities (CPF) in Buliisa District, the oil pipeline projects and the Rwamutonga land grabbing case in Hoima district. These oil projects are articulated in the following subsections.

The Oil Refinery in Hoima District

After establishing that there are commercial oil deposits, the government of Uganda embarked on the best mechanism to sell this oil. This was against the interests of most of the “investing” companies, which were pushing for the building of a crude oil pipeline that will transport unprocessed oil to the coast for exportation. In the contested negotiations, Kashambu (2011) and

Baineomugisha *et al* (2006) reveal how the President of Uganda responded to the transnational corporations rejecting the decision for oil refinery: “We should resist ferociously those parasites who want to give away this resource for ‘a morsel’ of food as did Esau in the Bible”. These contestations and struggles regarding whether or not to construct oil refineries in Uganda clearly indicate how transnational oil corporations have selfish capitalistic oil interests. Oil issues in Uganda (2015) reveal that once oil refinery is constructed in the country, it will originally have the capacity to process 30,000 barrels of oil a day which will be increased to 60,000 barrels per day before 2020, much less than the government had initially planned. According to the study, conducted by UK consultants, Foster Wheeler, “a refinery project is economically viable: an “investment” of some USD 2 billion would bring a high rate of economic return, enabling Uganda to become self-sufficient in petrol, Diesel and Kerosene, while also exporting a surplus to Rwanda, Burundi and parts of Kenya, for a period of up to 30 years” (Kashambuzi 2011).

After a long struggle to identify the Transnational Oil Corporations to construct the proposed oil refinery, on Tuesday 10th April, 2018, Albertine Graben Refinery Consortium (AGRC), the venture of American and Italian corporations, were commissioned to design, finance, construct and maintain oil refinery in Uganda (New Vision, Thursday April 12th, 2018; Government of Uganda 2018). According to the permanent secretary, MEMD, Robert Kasande, the American and Italian corporations will finance the total Sh14.6 trillion (\$4b) required “investment” for the refinery and government will pay back when oil revenue starts flowing in 2020.

Oil refinery was agreed to be built in Kabaale Parish, Buseruka Sub County in Hoima District. The oil refinery (OR) project required the “acquisition” of land covering an area of 29.34 Km² and affected a total of 13 villages. The project also affected 1221 households and directly affected 2473 persons (Refinery Action Plan 2012). The “acquisition” of the land preceded a commissioning of a RAP to form the basis of compensation. The preparation, implementation and management of the RAP was handled by Strategic Friends International (SFI). The RAP laid out a detailed criterion for resettlement of PAPs including the payment of compensation and resettlement to alternative land for the few PAPs who chose this option; the provision of a complaints handling mechanism and the restoration of livelihoods among others.

As it analysed in the next section however, in spite of a well formulated RAP that aspired to follow international best practice, PAPs have faced a varying number of challenges such as: non resettlement to date and delayed housing infrastructure, public services and utilities put in place for the benefit of those who opted for non-cash compensation; exposure to insecurity for persons waiting on resettlement; delayed payment of compensation to PAPs and its

effect on the value of money to restore land in the neighbourhood; contested valuations and assessments of affected land and developments; exposure to livelihood risk following directives not to continue with developments upon the pronouncement of cut off dates for compensation; discriminative compensation rates due to politics of negotiability; and lack of consideration for minority groups like the elderly, child-headed families and PWDs vis-a-vis the options chosen by closest family members/guardians. These challenges continue to prevail for affected PAPs.

The Construction of Oil Pipeline to Tanzania: Implications for Oil Village Communities

The manifestation of oil interests is also reflected in the construction of oil pipelines from Uganda to Tanzania. Uganda as a landlocked country needs internal and external pipelines to transport oil from Hoima where the Refinery is being constructed to the Coast for exportation. Uganda also needs internal pipelines which will transport oil for all the mines across the Albertine Graben to the Refinery in Kabaale Parish for processing (MEMD 2015). The pipelines Uganda needs to feed the refinery - Internal crude oil pipelines are; the 97-kilometre northern pipeline from Nwoya and Buliisa oil fields, the 50-kilometre pipeline from Kingfisher (Buhuka, Kyangwali Sub County), Hoima District and another pipeline from Kaiso-Tonya. The construction and development of these crude pipelines will be facilitated by the oil companies, whose expenditure will be recovered when oil production starts flowing.

The Inter-Governmental Agreement (IGA) for crude oil pipeline measuring 1445 km pipeline to be developed from Hoima in Uganda to Tanga in Tanzania was signed between Uganda and Tanzania on 26th May, 2017 in Kampala, Uganda. The IGA for the East African Crude Oil Pipeline (EACOP) Project was signed by Uganda's Eng. Irene Muloni, Minister of Energy and Mineral Development and Tanzania's Hon. Prof. Palamagamba John A.M Kabudi, Minister for Constitutional and Legal Affairs on behalf of their respective governments. In her words, Eng. Irene Muloni stated, "The bilateral negotiations for the IGA between the Republic of Uganda and the United Republic of Tanzania commenced in June 2016. The signing of this Foundation Agreement, upon which the implementation of the Project is anchored, is a major milestone." She added that the decision to select the Hoima-Tanga route as the least-cost route for transporting crude oil from Uganda to the East African Coast (at an estimated tariff of US\$12.2 per barrel) was premised on a fiscal incentives package offered by the Government of Tanzania which has been accepted by the Government of Uganda and all related discussions have been completed. On his part, Prof. Palamagamba Kabudi, stated, "The EACOP

Project is a landmark for the two sister nations and the Tanzanian Government is committed to working hard to expedite its implementation in order to open up the region for further opportunities for trade, and in turn fast track socio-economic development.”

The EACOP Project consists of a 1445km, 24-inch crude oil pipeline that will be constructed from Hoima in Uganda to the port of Tanga in Dar-es-Salaam, Tanzania, a decision which was agreed in April 2016. This is in line with Uganda’s commercialisation strategy for the discovered petroleum resources which provides for power generation, establishment of a refinery and export of crude oil. The signing of the IGA provides a foundation for other project agreements, including Host Government Agreements, Shareholders’ Agreements and Financing Agreements, which will be entered into for the implementation of EACOP Project (MEMD 2017). The signing of this IGA also calls for other interweaving actors with other interests. For example, the Permanent Secretary Ministry of Energy and Mineral Development emphasised that the EACOP Project brings opportunities for national content development to both countries and urged other actors to take chance for those opportunities. He said; “I urge the private sector to take advantage of the opportunities that come along with these developments such as skills development, technology transfer, and opportunities to provide goods and services.” The General Manager of Total E&P, Mr. Adewale Fayemi, on behalf of licensed oil companies, expressed their commitment towards the continued progress of the project in the most efficient and professional way for the benefit of all parties. He said: “The two East African countries have agreed to embark into what will be the longest electrically heated crude oil export pipeline in the world, another record happening in Africa.” Notwithstanding this, another pipeline of 205-kilometre pipeline from Hoima to Buloba will also be constructed (MEMD 2015; Goffe & Valeriya 2013).

The Central Processing Facilities (CPFs) in Hoima and Buliisa Districts

Oil interests are also manifested through constructing the Central Processing Facilities (CPFs) and other associated oil activities. Land Acquisition and Resentment Framework (2017) explains that CPF is where these impurities are removed from the oil. According to MEMD (2015) and Goffe, Valeriya (2013), three CPFs had been planned to be set up in Buliisa for the northern fields, at Kaiso-Tonya, Hoima and near the Kingfisher field in Hoima District. However, LARF (2017) elaborates that the current plan is to construct one CPF in each district (Hoima and Buliisa) as opposed to constructing one in each exploration area as originally planned. This is in the interest of reducing the project footprint from three to two CPFs. The CPF in the Kingfisher

Development Area and used by both CNOOC for Kingfisher operations and TUOP for their Kaiso- Tonya operations while the CPF in Buliisa will cover the EA-1, EA-1A operations and the EA-2 North operations. The estimation of the restricted area around the CPF and camps is determined by safety and security considerations but the extent of the restricted area is to be confirmed. Alongside CPF, there are many other oil activities needed for the CPF to be operational. In the LARF (2017), there is an elaboration of these activities which require the “acquisition” of land of different sizes and they include the following:

Firstly, there will be permanent camps near CPF where staffs will be residing for the project period, conducting oil activities. In this, two camps have been proposed for each operational area: (1) a base camp and (2) an operational support camp to accommodate field staff and contractors respectively. The camps will be located within the Global Restricted Area of the CPF. In addition, there will be temporary camps for three to six years. Secondly, many exploration well pads are currently being restored and planning is now underway for the final location of production well pads. The distribution of well pads across the Licensed Areas for the production phase is expected to be different from the exploration phase. Production pads will consist of a cluster of production and injection wells, thus consolidating land impacts to larger but fewer sites. The main influencing factors in the choice of well pad layout design are the drilling facility which will operate on the pad as well as the JV Partners’ obligation to minimise the project footprint. The third CPF linked oil activity is lake water intake station, where water will be extracted from Lake Albert and transported via pipeline to the injection well sites which will require the construction of two water intake stations by the lake. One will be in Hoima and another one in Buliisa. The fourth is the construction of pipelines for the transportation of fluids as follows: - Flow lines will carry well pads production to a Central Processing Facility (CPF) and feed injection water from the water intake station to the CPF and the well pads; - Feeder pipelines will transport crude oil from the CPF to the delivery point near the government refinery in Kabaale village. The length of pipeline from Buliisa to the delivery point is estimated at approximately 100km and the length of pipeline from the Kingfisher CPF to the refinery is estimated to be 50km. All pipelines are expected to be buried with registered conditional surface right of ways restricting land use to varying degrees. The fifth is the construction of feeder roads that connect the main roads to the respective areas of operations. The sixth is the upgrade and/or extension of existing airstrips including Kyabasambu (in Buhuka Flats), Pakuba and Bugungu which are anticipated in the development phase.

Considering the TILENGA project located in Buliisa District, the land acquisition and resettlement planning process has been broken down into four phases. Each of which contains various project facilities as follows: (1) Priority

Areas (RAP 1 Project Area), (2) Feeder Pipeline Components (3), North – Eastern Components and (4) North –Western Components. The operators of these facilities include TEP UGANDA for Contract Area 1 and TUOP for Licensed Area 2. Together with the Government of Uganda, they plan to develop the licensed petroleum fields in the Albertine region.

Specifically, the RAP 1 Priority Areas is predominantly located in Kasenyi village, Ngwedo Sub-County in Buliisa District (TILENGA Project: Resettlement Action Plan, September, 2017). It occupies an area of 784.504 Acres (317.477 hectares) and consists of the following components: Industrial Area (comprised of the Central Processing Facility, Operational Camps and Yards and Contractor Camps and Yards) which takes approximately 770.824 Acres of land and Industrial Area Access Road N1: which takes 13.68 Acres (5.536 hectares) of land. This land will need to be “acquired” from 185 landowners, including 121 individuals, 62 families and 2 clans. There is also an incremental land take for 15 properties which are partly covered by the RAP1 project areas where the retained land cannot sustain the livelihoods of Project Affected Persons (PAP). The potential Orphan land take is estimated to be approximately 2.187 Acres thus giving a potential total land take of 786.691 Acres. According to TILENGA Project: Resettlement Action Plan (2017), this may change following consultation with these landowners if they decide to retain their land or not.

According to LARF (2016), the JV Partners anticipate that petroleum infrastructure development will necessitate more permanent land “acquisition” for large scale and linear infrastructure, resulting in the involuntary displacement of communities. While land access during the exploration phase was limited to surface rights license agreements, deeds of easements, and compensation for temporary crop disturbance, this phase of oil development and production requires permanent land “acquisitions” and resettlement. LARF (2016) also notes that in a few instances where expansion of existing oil infrastructure has occurred during oil explorations, affected persons have been compensated for damages to their assets, but there has been no need for resettlement as a result of physical displacement. Therefore, there is need to understand how various oil actors interface with each other in “acquiring” land for oil activities and the power dynamics in terms of negotiations and decision making processes and how these ramifications shape oil politics in Uganda.

The Rwamutonga Land “Acquisitions” by Private Wealthy Elites in Hoima District

The Rwamutonga case is of a private land “acquisition” process geared towards a development project – a waste treatment plant in particular. The case

is characterised by unlawful eviction of families on private land influenced by personal gain on the part of the persons involved and to the detriment of ordinary people. Earliest settlements at Rwamutoga village, Katanga in Bugembe Sub County can be traced back to the late 1960s and early 1970s when a handful of settlers occupied the land and were later joined by others over the years (Civil Society Coalition on Oil and Gas in Uganda (2014). On the 25th August 2014, 54 tenants previously recognised by a one Tibagwa; 148 families unlawfully included in Tibagwa's title; and 53 families unlawfully included in Bansigaraho's title resident on land measuring approximately 485 hectares in this village were violently evicted pursuant to a Court Order issued by the High Court at Masindi and arising from a consent order entered between two litigants namely Robert Bansigaraho and Joshua Tibagwa (Civil Society Coalition on Oil and Gas in Uganda 2014). Both Bansigaraho and Tibagwa obtained Certificates of Land Registration comprised in FRV 10521 Folio 6 Plot 44 Block 7 and FRV Plot 34 Block 5 of land in Kakora and Rwamutonga respectively.

The former and the latter "acquired" an estimated 40 acres of land each through recognised legal transactions. However, both caused registration of land in excess of what was legally theirs thereby illegally rendering 150 families that owned the other chunks of land trespassers or tenants at sufferance. Tibagwa then initiated two court actions against residents on land he claimed belonged to him in Civil Suit No. 01 of 2012 and Civil Suit No. 33 of 2012 at the High Court in Masindi and in which he sought Court declarations that he was the owner of 382 hectares of land on the one hand and orders against the residents to give him vacant possession (ACODE 2016; Civil Society Coalition on Oil and Gas in Uganda 2014). About the same time Tibagwa initiated another legal action against Bansigaraho and the Hoima District Land Board in which he sought cancellation of the Bansigaraho's land title (ACODE 2016; Civil Society Coalition on Oil and Gas in Uganda 2014).

In the midst of all these developments, Tibagwa is alleged to have received an offer from an "investor" McAlister Resources Ltd; an American Company registered in Uganda desirous to establish a waste treatment plant. Tibagwa leased the same land and even went ahead to receive an advance payment from the oil company. It is contended that Tibagwa with the financial boost entered into a consent judgment with his rival Bansigaraho in which he effectively assumed ownership of the entire land contained in Bansigaraho's title and the said title was cancelled. The said consent order was reached without due regard to the households/ families that owned land legally. Consequently, this led to the illegal eviction of all families on the entire land. Neither Tibagwa nor Bansigaraho paid any compensation to the said 150 families and there has been no intervention on government's part to support the victims of the alleged illegal eviction.

On October 22, 2015, the High Court in Masindi ruled that the eviction was unlawful and the judge awarded the evictees damages and costs of the suit (Ssekika 2015). With support from NGOs like National Association of Professional Environmentalists (NAPE), they were able to return to their land following the ruling by Justice Simon Byabakama in 2015 that the eviction was unlawful. By 2016, the evictees had been re-evicted and remained stranded in a temporary camp with neither compensation nor damages for wrongful eviction and the case had remained in litigation (Global Rights Alert 2015).

On March 29, 2018, Naturinda Precious of Community Green Radio Uganda, wrote an article entitled: “*Rwamutonga Compensation Court Case in Balance as Evicted Families Struggle to Raise 37 Million Court Fees*”, explains that following evictees incapability to pay 37 million Uganda shillings (about USD 10,000) in court as filing fees, their case is about to be abandoned. This followed a filed a case by the evicted families against the two landlords, Tibagwa Joshua and Bansigaraho Robert, seeking orders of cancellation of land title on grounds of fraud and 31.8 billion Ugandan shillings as compensation of their crops, animals, houses and household items which were damaged during the eviction in 2014. Nelson Atich, one of the representatives of the affected families in court, says court assessed the filing fees at 37 million due to the huge compensation claim. Atich however, adds that “the affected families are too poor to raise 37 million shillings and are looking for assistance from well-wishers”. He adds that with the help of Justice Centres Uganda, they only paid 100,000 shillings. Jonathan Tiyo, a lawyer from Justice Centres says under the law, failure to pay filing fees renders the suit incompetent; and they have applied to court to exercise its discretion and ignore the filing fees and regard the evictees in the suit as paupers. In his explanation, Tiyo says that Pauper suits are provided for under the law. Order 33 of the Civil Procedure Rules, provides that a person without the means can apply to court to waive the fees and permit him or her to sue as a pauper (Naturinda 2018). However, before court exercises its discretion to waive the fees, it has to first make inquiry into pauperism. He explains that in case court fails to permit them to prosecute as paupers, the evictees will have to either review the case or seek only cancellation of land titles and abandon the claim for compensation, withdraw the fees or appeal to well-wishers to pay the filing fees. All these speak to capitalistic oil interests that front selfish enrichment and sideline community interests. They also have long standing implications on community livelihoods resulting from suffering of land alienation in the OVCs.

Summary of the Selected Land Acquired for Oil Activities in the OVCs of Uganda

While some case by case has been analysed in the previous section, it is imperative to provide a summarized data revealing the land “acquired” in the oil village communities of Uganda and the key oil actors that were interested in the land. This provides a clear picture on the glaring implications for community livelihoods in the oil village communities. The table below summarises the estimated acquired land for oil activities in acres.

Table 1: Showing an estimated size of land acquired for oil-linked activities in the Oil Village Communities

Category	Land size (in acres)	Oil Actors
Oil refinery	72,499	Tullow, TOTAL E& P, CNOOC
Industrial Area (Central processing facility)	787	Tullow, TOTAL E& P, CNOOC
Rwamutonga land case	485	Wealth individuals (Tibagwa and Bansigaraho) to sell to McAlister Resources
Nyamasoga waste treatment and disposal facility	100	Enviro-serve
LYEC discovery area	6670	TOTAL E&P, Tullow, CNOOC
PAARA discovery area	147,706	Tullow, TOTAL E& P, CNOOC
Buliisa Discovery area	105,469	Tullow, TOTAL E& P, CNOOC
Kaiso-Tonya Discovery Area	30,134	Tullow, TOTAL E& P, CNOOC
Kingfisher Development Area	84,968	CNOOC, Tullow, TOTAL E& P,

Source: Fieldwork

As indicated in the table above, huge chunks of land have been “acquired” by different actors with varying interests in oil “investments”. Accordingly, areas where oil is going to be extracted takes the biggest share, followed by oil refinery. This land has been acquired by the Transnational Oil Corporations through government support. There are also huge chunks of land privately “acquired” for oil “investments”. All these “acquisitions” have resulted into short notice community evictions as the case of Rwamutonga land evictions in 2014 (CRED 2014). Some other “acquired” land has been left idle without oil activities, others occupied by strange people. For example, out of 100 acres “acquired” for oil waste processing plants and disposal facility in Nyamasoga village in Hoima district, only 40 acres are being utilised. Much of the land that was acquired for

oil refinery was also found idle, while other parts occupied by strange pastoralists. In an FGD for example, they said:

We are surprised and aggrieved to find that the land where we were evicted without adequate compensation has been occupied by strange people not known in this area. They have come with their animals and built small huts in the refinery land where they are rearing their cows, yet for us the original land-owners we no longer have access to the land. Whoever is pushing these unknown people in this area is likely to see fire burning. (FGD, 11th March, 2018, PAPs from Kyapaloni village, Hoima district).

In short, land acquisition in the oil village communities is complex because there are various actors at different scales interested in land. These actors have different power relations that influence land acquisition decision making in different ways. In all these however, local citizens are vulnerable as they are powerless to defend their rights, yet the state which has social contract with them, is equally acting as referees, watching the TOCs dispossessing its citizens. These challenges are more articulated below.

Challenges of Land “Acquisition” Processes in Uganda

Comparing Ugandan land “acquisition” Laws with International Standards

In order to understand how Large Scale Land Acquisitions (LSLAs) for oil related activities are impacting people in the oil village communities, it is important that we also understand the underlying gaps in the existing oil and land laws and policies in Uganda. Comparing the legal requirements for land “acquisitions” in Uganda with the international standards critically makes us grasp the existing gaps in Ugandan context. Based on the analysis of these laws and policies, there is variance between the national legal provisions and the international standards relating to land “acquisitions” and compensations for different project affected persons. It has also been noted that the variance comes in terms of legal provisions and practice on the ground. These issues are summarised in the table below.

Table 2: Showing Comparison of the Ugandan Laws and International Requirements Regarding Land “Acquisition” and Compensation

Category of affected persons and affected property	Ugandan Laws	International Requirements
Land owners	Cash compensation based on market value plus disturbance allowance of 15 percent	Recommends ‘land’ for ‘land’ compensation. Compensation is at replacement cost. Provide transitional support to the economically displaced persons based on estimate of time to restore their income earning capacity, production levels and living standards.
Tenants	Entitled to compensation based upon amount of rights they hold upon land	Must be compensated for loss of livelihoods irrespective of the legal recognition of their occupancy.
Share croppers land	Not entitled for compensation for land	No land compensation but income must be restored
Owners non-permanent building	Cash compensation plus disturbance allowance	Recommend land for land compensation or compensation at full replacement cost labour and transaction cost inclusive
Perennial crops	Entitled to compensation for crops	Recommend land for land compensation or compensation at full replacement cost labour and transaction cost inclusive
Business income	No compensation. The six months’ notice is supposed to help people re-establish their business	Compensate the cost of re-establishing the business, lost net income during the business and cost of transfer.
Acquisition of land and time of compensation	The constitution of Uganda requires prompt payment of a fair adequate compensation prior to taking possession and acquisition	Recommends ‘land’ for ‘land’ compensation

Source: RAP, 2012

As seen in the table above, where the project requires land, the international requirements favour land for land compensation. This is because land for land compensation has got in build benefits that the resettled persons enjoy. Even where cash compensation is done, it should be based on full replacement cost. Further still, possession and “acquisition” of land must be based on prompt, fair and adequate compensation. Zoomers (2010), validates this argument by explaining that five ethical considerations must be considered in “acquiring” land for development purposes. According to her, they include: (1) Transparency in negotiations, (2), Respect for existing land rights, (3), Sharing of benefits from the development projects, (4), Environmental sustainability and (5), Adherence to national trade policies (Zoomers 2010:442). Based on these, therefore, international requirements are more favourable to the oil village community members. Unfortunately, evidences from the fieldwork, indicate that these ethical issues were not taken into considerations since there was no transparency in acquiring land, neither did those acquiring land respect the existing land rights in the region. What can be learnt is that for oil activities to be developmental, the government of Uganda and other oil actors need to adhere to international standards.

Contextual Analysis of Oil-Related Land “Acquisition” Challenges in Uganda

Given the enormous influence of market interests, which are in fact western interests, over the country’s policy and the institutional framework, government policies and laws on oil and land sector have been weakened to meet the enormous market demands of capitalistic “investments”. Various oil laws and policies such as Petroleum, Exploration, Development and Production) Act, 2013; the Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act 2013; the Public Finance Act 2015 and the National Oil and Gas Policy 2008 have been enacted but the capacity to ensure that oil explorations are successfully done without rendering community members squatter-ship status on their original land is questionable. This is because given the capitalistic tendencies of the policy environment there is likelihood of manipulation and downplaying the needs of the local citizens. This resonates with what Hertz’s (2001) observation that: “the business is in the driving seat, corporations determining the rules of the game and government acting as referees, enforcing rules laid down by others”. In such conditions, states tend to favour capitalistic interests, while marginalising and subordinating ordinary citizens, which results into devastating conditions as will be indicated in the next section.

Although the state was able to come up with the Land Acquisition and Resettlement Framework (LARF 2016) to guide how land “acquisition” and resettlement will take place in the oil village communities, this framework has

equally been questioned. On the paper, for example, LARF shows how oil projects will be implemented by the Joint Venture-partners, but in terms of government's role, the document does not clearly bring out the government's levels of engagement in the development of the LARF and the role of government in land "acquisition" processes (Civil Society Coalition on Oil and Gas (CSCO) 2016). While the scope and delineation of roles for Government and JV- Partners is not clearly spelt out, it is important to note that large scale land "acquisition" processes for oil activities impact on the land rights of Ugandans, which evokes the government's responsibility to protect citizens. The existence of these three JV partners, their respective institutions and agendas on the one hand, and the government on the other with its various institutions is fertile ground for overlaps in mandates. It further raises concerns about how activities of the actors will be coordinated, for smooth running and to avoid undue burden to the PAPs. Worst of all, the LARF contains some information on processes of valuation of land and other properties and the challenges that are encountered, but Uganda does not have a comprehensive legal and policy framework to guide processes of valuation. This raises a number of issues about the institutions engaging in valuations. The LARF makes provision for consultation of PAPs, community leaders and local governments (LARF 2016: 73-75), but the foregoing does not envisage cultural institutions in the oil village community. Yet it is highly plausible that some of the land that is up for "acquisition" is trust land which the cultural institution holds in trust for the people, or land that belongs to the cultural institution (CSCO 2016). The grievance Redress Mechanisms (GRM) which has three levels cannot be handled by an individual (the Community liaison officer) as stipulated in the LARF.

With these enormous institutional challenges worsened by neo-liberal capitalistic interests that are failing them to operate effectively, land Acquisitions in the oil village communities becomes even more complicated because of interwoven land related issues. Land speculation being one of them, it was identified from the outset as a key challenge to manage especially during compensation and resettlement processes. In an interview with the national coordinator, Civil Society Coalition on Oil and Gas in Uganda (CSCO) on February 21, 2018, he opines that speculative land dealings are motivated by profit making. In his words he said: "land speculation has been taking place in the Albertine region by wealthy business individuals who utilise the ignorance of the local people on the actual land prices and acquire huge chunks of land to either sell to the oil companies for oil projects or establish other businesses whose customers will be oil workers in the near future". Land speculators go further to establish some projects on such lands so that they can get more money during compensation. The RAP (2017) for example, notes that a total of 68.03 hectares of land were being actively farmed (gardens) at the time of the

Asset Survey. The report notes that this was a two times increment in the amount of land (36.55 hectares) than was being actively utilised in 2014. Evidence to this is indicated by the open fields that were digitised using Arc GIS desktop software on 2014 satellite imagery. It was also noted from the field that most of the speculative land was owned by well positioned individuals and had access to oil information from government. For example, in an in-depth interview with CRED official on 19th February, 2018, he noted with concern that most (80%) of the oil wells in Buliisa were discovered in the land that was owned by one private business man known as Francis Kahwa. These highly placed individuals speculated land for selfish interests and as evidenced by Rwamuntoga case, short notice massive community evictions took place to enclose the land with devastating effects on community livelihoods.

The penetration of capitalism in the land administrative system has weakened these institutions and gave rise to contested land ownership disputes. According LARF (2016:23), “this contestation is resulting from incomplete transactional processes, including title registrations”. To elucidate on this point, LARF (2016) gives an example of Buhuka Flats in the Kingfisher Development Area that was formerly a controlled hunting area under the Uganda Wildlife Authority (UWA). Current occupants of the land understand that the public use of the land was relinquished in 2002 or 2003 in response to the growing requirement for land from the surrounding communities. The land administrative process through which this land was relinquished is now under scrutiny to determine whether the transaction was fully regulated. New claims of ownership have arisen since the start of this investigation, further complicating the matter. The resolution of claims through the current land administrative system has not only caused delays in land compensation payments but also subjected the local citizens into surplus humanities and squatters.

It is therefore not surprising to note that most challenges highlighted in the letter by AFIEGO to the Chairperson, Commission of Inquiry on Land, National Records Centre and Archives, Kampala (U), entitled *‘memorandum of proposals on resolution of land disputes by mediation at grassroots level’* were rooted from capitalist ideology. This letter was addressed to the Chairman on 23 May 2017 and the challenges highlighted include: 1) lack of definition of key terms of compensation; unfair use of cut-off dates in compulsory land “acquisitions”, unfair valuations, delayed compensations, poorly facilitated district land boards, inadequate involvement of women in compulsory land “acquisition” processes and failure to issue customary land titles in the oil village communities. Section 20 of the Land Acquisition Act of 1965 mandates the Minister of Lands, Housing and Urban Development to put in place regulations for the assessment and payment of compensation to ease the process of compensation through

definition of key terms including prompt, fair and adequate compensation as they are provided for under article 26 (2b) of the 1995 Uganda Constitution. However, to date, these regulations have not been put in place. As reflected from the key informant interview on 12th February, 2018 in Kampala, without the regulations, project-affected persons and government will continue to conflict over what prompt, adequate and fair compensation is. This is evidenced by the court cases, on oil refinery, involving the refinery-affected people against government, have been lodged with court being asked to compel government to define key terms to prevent under- and delayed-compensation of project-affected persons.

Reflecting on use of cut-off dates in compulsory land “acquisitions”, in-depth interview with one of the affected person in Kyapaloni village revealed that it was not fair. While cut-off-dates are necessary to cap speculative behaviour and therefore deter bulging compensation bills, the dates have been used unfairly in compulsory land “acquisition” processes in Uganda. For instance, government set at June 2, 2012 cut-off-date for the refinery project. This means that any developments on the land after the date would not be compensated. The cut-off date was not time-bound such that the over 100 families which are yet to be compensated have complained that their ability to make a living through growing perennial cash crops has been derailed for nearly six years. In an in-depth interview with one of the affected person in Kyapaloni village on February 09, 2018, a man lamented: “I used to earn around 600,000 every month from my coffee gardens but since they stopped us from using our land, I have been rendered powerless. I no longer earn anything and my children are almost moving necked”.

The use of valuations has also been considered by the sections of the project-affected persons to be unfair. In the case of oil refinery, to date, 27 of the affected persons have not signed for the compensation that government gave them on grounds that it was unfair. Compensation rates for crops were also considered unfair with crops such as bananas, mangoes and coffee among others. These provided families with annual incomes being compensated as a one-off and at low rates. For instance, an acre of mature, good bananas was compensated at Shs 1.9M. An acre of mature Robusta and clonal coffee were compensated at Shs 2.5M. Families complained that such compensations did not factor in income and food loss, yet, some families, only have mangoes for food during drought. The above crops are planted once and families harvest produce over a number of years. Families expected to be compensated for the income and food loss they would incur as these crops were replanted and they grew in the new areas of resettlement. However, this did not happen. Even in situations where compensation was offered, it was a delayed. Despite article 26(2b) providing for prompt payment of compensation prior to compulsory

land “acquisitions” by government, the refinery-affected people’s compensation were also delayed. Findings from the field indicate that it was until November, 2017 that most families opted for relocation were resettled to Kyakaboga. The matter of delayed relocation has been a subject of disputes especially because families experienced various socio-economic impacts including insecurity, loss of income and others owing to delayed relocation.

During the preliminary visit for this study on 17th March 2017 at Hoima District, it was established that District Land Boards were poorly-facilitated to handle oil related land issues. District Land Boards in Uganda are generally poorly facilitated as regards financing and human resources. While section 59 of the 1998 Land Act mandates them to annually set compensation rates for crops and buildings of a non-permanent nature, the boards, a number of whom lack valuers, are unable to deliver on this mandate. Where they have been able to as was admitted by the chairperson of the Hoima District Land Board (HDLB) during a March 10, 2017 radio talk show at Spice FM in Hoima district, the Chief Government Valuer (CGV) has slashed these rates. This not only results in compensation-related disputes between communities and government over low compensation, it also causes friction between the CGV and district land boards.

Inadequate involvement of all categories of local citizens in compulsory land “acquisition” processes was also a challenge. Considering women for example, there were intra-household disputes as a result of lack their involvement. As the RAP for the refinery project noted, only 48.5 percent of women had documents showing that they owned property; 69.4 percent men on other hand owned property. This meant that more men than women were entitled to compensation. Moreover, men were more educated than women with a literacy level of 72.8 percent being recorded in male-headed households compared to 30.5 percent among the women. Further, more men (16.6 percent) than women (6.1 percent) owned bank accounts (RAP 2012). This put women in a vulnerable position in which men could receive compensation at their detriment. For example, “acquisition” of land on which the women accessed water puts an undue burden on them to find alternative sources of water. “Acquisition” of land on which women farmed to feed their families leaves them with constrained alternatives yet they still have to provide food. “Acquisition” of land on which they settled with their families without adequate alternative accommodation leaves them with an unfair burden since they are the primary care givers in most households. While LARF (2016) highlights the situation of women within the context of past project experiences with reference to assistance to vulnerable groups, it sidelines what will happen to them after resettlement. It is noted that spousal consent was used to include women in making choices about compensation options. This is commendable. It should

however be noted that participating in the choice of option does not guarantee that the vulnerable women will partake in the compensation option chosen, more so if it is cash.

Implications for the Community Livelihoods in the Oil Village Communities

The implications of oil related large scale land “acquisitions” for community livelihoods in the oil village communities can logically be understood through analysing five livelihood capitals: Human capital, social capital, physical capital, financial capital and natural capital. According to the Department for international Development (1999), these livelihood capitals are essential for human survival. During the fieldwork, various types of livelihoods have been identified in the oil village communities and among others include crop farming, fishing, livestock rearing, forest resources, bee keeping and tourism.

Crop farming is the predominant economic activity in the Albertine Graben with 95 percent of the rural population cultivating on an average farm size of two acres of land. Seasonal crops are grown for home consumption and the surplus is sold off to offset household necessities. The main food crops cultivated in the project area are: sweet potatoes, maize, beans, cassava, rice, sorghum and bananas. Cash crops grown in the region include tobacco, cotton and tea. Agriculture in the Albertine Graben is rain fed and it depends on the two seasons of high rainfall that have been recorded (April - May and August-October) (LARF 2016). According to Land Acquisition and Resettlement Framework (2016), fishing is the second most important economic activity in this area and it provides informal employment to local citizens such as youth and women in fishing and its associated industries such as fish preparation and preservation; transportation and market sales. Livestock rearing and poultry keeping are practiced although they have not been fully developed. Cattle are mainly reared for sale and beef production; breeding of dairy cows is not common in this region. Beef produced by local herdsmen is sold in the local region. Open range grazing (communally used land) is the most widely used grazing system in the area since many herdsmen cannot afford the cost of securing private grazing land. Poultry, goats, sheep and donkeys are reared on very small scale. Tourism is also common livelihood activity because Albertine Graben is known for its rich biodiversity and is a popular tourist destination. The Murchison Falls National Park is the largest protected area in the region covering a land area of 3,840km² in Buliisa and Nwoya districts and it receives a large proportion of tourist visitors in this area. Trading on the other hand is primarily reserved to the urban centres although some people operate village shops or market stalls. Transport is provided by some youth who are engaged

in “boda-boda” businesses although passengers and cargo are also transported on Lake Albert mainly on small vessels and ferries. Other wage based livelihoods are available to a minority of the population in the Albertine Graben, and include teaching and local government employment. Remittances are also received from employment outside the country, mainly Southern Africa, Europe, USA and Canada through social networks developed overtime.

Nonetheless, as a resulted of oil discovery, most of these livelihood patterns have been disrupted and renders citizens vulnerable to various shocks and marginalisation. During the fieldwork, several respondents attested to this as one of the Project Affected Persons in the IDI noted:

We cannot consider oil discovery to cause any development when we have been alienated from our land rights, a source of livelihoods. As women, we would be given land from our husbands and relatives to grow crops for our own income. We would join farmers’ groups and through concerted effort, we could produce around 40 sacks of groundnuts each and sell in large quantities. Land was available for every woman who was energetic and willing to make money. However, since oil discovery, there has been a renewed interest on land. Those who used to give us land can no longer give us because they want compensation and many households have migrated because of oil discovery. We no longer have access to farmer’s groups. (IDI, 10th March, 2018, Kitegwa Village, Hoima District).

The above assertion can explain the intensity of oil discovery implications on community livelihoods. These livelihood capitals fulfil different roles and therefore have different meanings. First, human capital represents the skills, knowledge, ability to labour and good health that together enable people to pursue different livelihood strategies and achieve their livelihood objectives. Second, social capital denotes social resources upon which people draw in pursuit of their livelihood objectives. They are developed through networks and connectedness, either vertical (patron/client) or horizontal (between individuals with shared interests) that increase people’s trust and ability to work together and expand their access to wider institutions, such as political or civic bodies; membership of more formalised groups which often entails adherence to mutually-agreed or commonly accepted rules, norms and sanctions; and relationships of trust, reciprocity and exchanges that facilitate co-operation, reduce transaction costs and may provide the basis for informal safety nets amongst the poor (Bourdieu 1983; 1986; 1989; 1992).

Thirdly, natural capital means natural resource stocks from which resource flows and services useful for livelihoods are derived. These range from intangible public goods such as the atmosphere and biodiversity to divisible assets used directly for production such as land and forests. Natural capital such

as land is very important because all people derive all or part of their livelihoods from resource-based activities (farming, fishing, gathering in forests, and mineral extraction, among others). The Department for International Development (1999) emphasises that none of us would survive without the help of key environmental services and food produced from natural capital. Fourth, physical capital comprises the basic infrastructure and producer goods needed to support livelihoods. They include affordable transport, secure shelter and buildings, adequate water supply and sanitation, clean, affordable energy, and access to information (communications). Finally, financial capital denotes the financial resources that people use to achieve their livelihood objectives. This definition is not economically robust in that it includes flows as well as stocks and it can contribute to consumption as well as production. However, it captures an important livelihood building block, namely the availability of cash or equivalent, which enables people to adopt different livelihood strategies. There are two main sources of financial capital and they include available stocks such as savings and regular inflows of money from various sources such as pensions. All these five livelihood assets have been disrupted in the oil village communities in different ways as a result of oil related large scale land “acquisitions”. Therefore, based on these livelihood assets, this chapter analyses the implication of large scale land “acquisitions” on livelihoods in the oil village communities. To start with the disruption of human capital, social and financial capital, the following are some of the details of persons that were affected by the land “acquisition” process for Uganda’s proposed oil refinery in Hoima District.

Table 3: Showing the affected persons by land acquisitions for oil refinery in Hoima district

	Oil Refinery
Affected Population	Total Number persons affected
Total number of affected persons	7, 118
Total number of affected households	1, 221
Total number of affected women	3, 514
Total number of affected children under 5	1, 344
Total number of affected elderly	181
Total number of affected chronically ill persons	106
Total number of affected persons with disabilities	201

Source: RAP Report, 2012; page vii

As indicated in the table above, 7,118 people were affected with 1221 households. Out of these, 3514 were women, 1344 children under five years, 181 elderlies, 106 chronically ill persons and 201 persons with disabilities. The report also indicates that a total of 1034 (84.4%) of the households affected were headed by men while 178 (14.6%) were headed by women. In general, 49.4% of the affected persons were women while 50.6% were men (RAP report, page 29). In reflection to the elderly, one old man was forced to be resettled and does not know where his sons went after compensation. In an in-depth interview, 87 old man narrated:

I had five sons all married with children and we were staying together as one family. When government decided to take our land for oil refinery, I opted for cash compensation so that I can relocate with my sons. However, the government forced me to resettle here in kyakaboga and since 2012 when my land was taken, I was given this house in December 2017. Unfortunately, I don't know where my sons went and in case I get sick, I don't know who can help me because we speak different languages. (IDI 26th January, 2018).

What this implies is that most of the affected people are vulnerable and therefore may not be able to meet their livelihood opportunities once disrupted by oil activities. Reflecting on the 1,344 children under five years for example, for six years now, they have not been able to get education because the only viable schools of Kyapaloni and Nyahaira Primary Schools were ignored by government and collapsed in 2013. The PAPs' children are yet to find other schools because even the one built in Kyakaboga resettlement site is not yet open.

The RAP (2012) also states that at the time of the cut-off date in June 2012, the 13 affected villages of Kabaale had a number of social assets including: four (4) schools with 926 pupils; fourteen (14) water sources; thirteen (13) churches; six (6) diesel grinding machines; three (3) football pitches; one (1) mosque; one (1) market and one (1) video hall. According to the RAP (2012:29), all landowners were entitled to get compensation for the value of their property plus a disturbance allowance. While the RAP (2012) commits the government to provide water, electricity, a good quality murrum road, a community centre, a cemetery, a nursery school and two churches (an Anglican and Catholic one), the Ministry of Energy has not sufficiently provided any of the above. This was collaborated from the fieldwork visit, where a resettled PAP who was a former LC1 Chairperson lamented:

In this resettled land we are suffering. In our previous villages where oil refinery is being constructed, I remember we had 4 schools, 14 bore halls, 13

churches and 6 diesel grinding machines. Here in kyakaboga, there is nothing. The only school that has been constructed is not working six years on the road. How does government expect our children to study? We have only one bore hall to supply water for the whole parish, no health centre and no church. How shall we survive in this camp without these human needs? (IDI 7th March, 2018, Kyakaboga Resettlement Village, Hoima District).

While it was found out that a school has been constructed in Kyakaboga resettlement camp, it is not yet functional, yet pupils are expected to relocate with their families and attend school. In addition, only one borehole has been constructed in Kyakaboga, yet during the field work it was observed that the area faces water scarcity. Further, none of the 46 houses built has a lightning conductor yet the area is prone to lightening. The rest of the amenities including churches and a cemetery have been ignored despite the fact that the refinery area had four schools, 13 churches, one mosque and 15 water sources before the disruption. Further, the land allocation map, *Land for Resettlement of persons affected by the oil refinery project; Buseruka sub-county*, noted that the amenities will be provided. Lack of these social amenities has serious implications on social capital which is an important form of community livelihoods.

Additional documentary evidence on how oil related large scale land “acquisitions” impact on community livelihoods is analysed from the proposed industrial area and N1 Access road in Buliisa District. Table 4 summarises the affected persons and other livelihood assets.

As indicated in Table 4, there are many people as well as numerous livelihood assets that have been affected by the proposed industrial area (part of central processing Facility). This implies that the affected persons have to be compensated promptly and adequately so as to regain their livelihood loss as soon as possible. According to the RAP (2017), the main types of livelihoods encountered in the Priority Area are land-based livelihoods with some non-land micro-businesses (tailoring, hairdressing, boda-boda). Accordingly, livelihood options have been selected and as land in the vicinity of the Priority Area is limited in its availability, and resettlement will lead to increased pressure on grazing land and natural resources, emphasis has been given to alternative livelihoods. These include vocational and business training and linkages to potential employers and microfinance; improving life options (through adult and youth literacy and numeracy – including financial literacy and use of mobile money), improving the quality of life (through improved health, water, sanitation and education services) and improving the productivity and profitability of farming activities through training and advisory services, improved inputs and access to credit). Nonetheless, research is still going on to establish whether the commitment made in the 2017 RAP will be fulfilled.

Table 4: Showing the affected persons and properties in the proposed industrial park in Buliisa District

Category of Affected Persons	Population
Total number of project affected persons (PAPs)	610
Total number of affected households	601
Percentage of affected population living in Kasenyi	67.8
Land Ownership	
Total number of affected individual landowners	121
Total number of affected family-owned land	62
Total number of Clan-owned land	02
Houses and Structures	
Total number of affected residential structures (completed) in the Priority Areas	275
Houses of which are used for primary residence	28
Total number of affected residential structures (uncompleted) in the Priority Areas	104
Social, Economic and Legal	
Total number of identified PAPs who are physically displaced	28
Total number of identified PAPs who are economically displaced	345
Total number of identified PAPs who are both physically and economically displaced	237
Total number of graves in the Priority Areas	49
Total number of sacred sites (clan cultural sites) around the priority areas	02
Total number of sacred sites (family shrines) in the priority areas.	15

Source: TILENGA Project: Resettlement Action Plan, September, 2017

Based on the RAP findings, Land use in the proposed industrial area is limited to farming, cattle grazing and natural resource harvesting. Farming is characterised by small-scale-farm plots for household subsistence and some trading. Livestock rearing is an important livelihood strategy and is undertaken by up to 80 percent of all registered PAP households. The most common livestock kept are goats and chickens, followed by cattle, ducks, sheep, pigs, pigeons and rabbits. Only 54 percent of surveyed households own cattle, but cattle numbers per household can reach several hundred head. The unrestricted grazing causes conflicts between grazers and crop growers. Several factors (including expanding residential, cropped, and industrial land take) is reducing the availability for grazing land, and constraining grazers' ability to move to good pastures and to water resources, further increasing the potential for land

conflict. In the RAP (2017) also, it was further noted that nearly all project-affected households (98%) harvest natural resources present in the Industrial Area, of which half consider such resources to be of high importance in sustaining household livelihoods. The most common resources that are collected include firewood, grass for thatching, wild fruits and vegetables, and medicinal plants. The collection of natural resources is a very important component of rural livelihoods, and the proposed Industrial Area is a prime source of these items for residents in the surrounding villages, including for registered PAPs and members of the wider community. The loss of the Industrial Area will therefore increase pressure on the remaining areas of common, uncropped land, and may lead to a more rapid degradation of the natural environment and possibly increase in encroachment on conservation areas.

Conclusion

The relationship between oil discovery and increased large scale land “acquisition” is not disputable in the academic literature. As analysed in the chapter, the profitability and lucrateness associated with oil wealth globally, attract various interests in exploiting oil opportunities in the oil village communities. Land being the entry point for oil access was acquired either legally or fraudulently depending on the nature and strengths of the existing legal requirements. The key players such as the government, oil companies, private wealth individuals, civil society organisations and the host communities struggle in various ways to ensure that their interests are fulfilled. In the process, community livelihoods such as social, economic, human, physical and financial are disrupted, with adverse effects on vulnerable community members. In this chapter, findings reveal that different land tenure relations bring in different challenges in the process of “acquiring” land for oil activities. First, that among four land tenure relations, customary land tenure relations are undermined and those who hold it have to work towards processing land titles. Second, in the process of “acquiring” land, those who own land customarily but do not have written documents to prove ownership, could not be compensated. Third, in the compensation and resettlement procedures, the process was selective to specific items and yet marred with disagreements, disappointment and delays. This indicates that the implementation of land laws and policies has been partial and slow and that they have been marred with corruption. Findings also indicate that the dominant land tenure relations in the oil village communities was customary and the powerful groups interested in oil resource opportunities would fraudulently process and “acquire” land titles to access and own land.

In areas where economic competition is high and capitalistic projects are being established to maximize profits like in oil village communities of Uganda, vulnerable groups like children, women and elderly have been found to be suffering more than their counterparts. This is because the property owners are interested in making profit from the land, either by selling it to the state and oil companies and get compensation, or developing it to benefit from the oil boom and boost opportunities and so does not prioritise the interests of such vulnerable groups. This originates from the nature and ideologies of the existing land and oil laws and policies that systematically supports capitalistic interests and displaces community members and their assets.

Logically, the dominant idea that fair compensation is an answer LSLAs is unrealistic and cannot help in preserving community livelihoods during capitalistic developments like oil activities. Two reasons explain this. The first is that compensation whether fair or unfair is a continuation of neoliberal policies and has adverse outcomes including marginalisation and dispossessions. Second, compensation does not mean much in a context where affected people lack alternatives and use their land as a safety valve. That is to say that compensation cannot substitute the source of livelihoods that originate from the land but rather increases inequality and poverty. The time has arrived to acknowledge that central and local governments, in concert with other stakeholders, have important roles to play in setting the rules for inclusive and sustainable development. What we need is a more fundamental discussion about how to deal with the causes of ‘disembedded economy’ and what it means for development. We need to look at how we can deal with further dispossession and commoditisation of nature (land), how we can ensure the sustainable and productive use of land while guaranteeing inclusive development, and protecting the rights of existing users.

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Dispossessed and Marginalised Majorities: The Crises of (Neo-)colonial Theft and Economic Exclusion in Africa South of the Sahara

Shadreck Warikandwa

Introduction

At any historical juncture, it is not an anomaly for societies that have been dispossessed and incorporated into the periphery of capitalist world plunder and expansion to exhibit internal contradictions of rapid economic growth and desperate widespread poverty within the same polity. This is so since it is within the logic of capitalist accumulation to create class distinctions capable of producing socio-economic privation and imbalances of this character. These imbalances are sustained by vast circuits of exploitation and unequal exchange in trade and the resultant axial division of labour Amin (1976:135) extending across the world as engendered by the capitalist world system. Africa south of the Sahara (hereafter referred to as Africa) is currently experiencing three such contradictory phenomena that are hugely consequential in determining how the contours of the continent's socio-political landscape in the immediate and long-term future will look. The import and implications of these phenomena have at best been conveniently misinterpreted in certain quarters, and at worst wilfully disregarded especially within academia, to the detriment of Africa majorities who must endure the crucible of vicious cycles of poverty, privation and war as by-products of excessive wealth in minority holding.

The first such phenomenon is that of sustained economic growth measured by Growth Domestic Product (GDP) spanning the better part of two decades for the majority of Africa countries. Statistics show growth on the continent has averaged around 5 percent annually, with some countries posting between 7 to 11 percent in the past decade African Union Economic and Social Council (2015:3). International Monetary Fund in Bond (2016:8) has recorded growth rates of between 4, 7% to 5, 4 % for the same period, ascribing this upward growth to 'good governance, transparency and sound economic frameworks'. These economic growth statistics have in turn been touted as Africa's moment to catch up with the rest of the developed world, in the process invoking linear development modelling consistent with Rostow and the neoliberal school.

The second phenomenon is that of a marked rise in transnational corporations' plunder afflicting Africans with poverty, impoverishment and unemployment, accompanied by the resultant rise in militancy among the youth, developments which sit uncomfortably beside the so called golden boom. The number of people living in extreme poverty has increased by approximately 100 million in the same decade of economic growth Beegle *et al* (2016:5) and as far back as 2012, youth unemployment had hit 84, 9%, African Union Economic and Social Council (2015:3). Golub and Hayat (2014:2) have observed that both formal and government employment absorbs below 5% of the labour force in the majority of countries on the continent. For most low income countries in the region, the informal sector accounts for at least 80% of total employment and this figure often rises to between 90% and 95% Golub and Hayat (2014:2). On the same note, the bulk of Africa's citizens still live below the global extreme poverty rate of USD 1, 90 per day Beegle *et al* (2016:4), including in Nigeria, the biggest economy in Africa. Gross National Product (GNP) per capita measured in terms of population is a paltry USD 1440 in Africa compared to the world average of USD 6 300 Hagen (2002:147) and 33 of the 48 countries designated as least developed are in Africa, while 34 of the 42 Highly indebted Poor Countries (HIPC) are also on the continent Hagen (2002:147). With regards to the rising militancy among the youth, the UNDP (2016:4) notes that the majority of rebel movements in Africa including Al Shabaab and Boko Haram are largely products of youth marginalisation from political and economic life. The same UNDP report states that Boko Haram alone has caused the internal displacement of over 1,2 million people in Nigeria with a further 200 000 Nigerians fleeing to neighbouring Cameroon, Chad and Niger. There were also at least 200 Al Shabaab linked attacks in Kenya between 2011 and 2015, UNDP (2016:5). These lived realities certainly do not reflect the dynamics of a rising Africa in any meaningful way.

The third phenomenon is that of the lethargic response offered by Africa governments by way of intervention to ease these contradictory developments. Essentially, governments should be able to harness economic growth to realise socio economic transformation among their peoples, without which genuine economic development cannot occur. And yet, what we find obtaining on the continent is a well-developed economic duality composed of a small enclave of foreign commercial interests which enjoy unfettered control of the wealth of the continent, juxtaposed with grinding poverty and mass unemployment plaguing the majority peoples, this together with weak or dysfunctional governments that have no clout to intervene on behalf of the dispossessed, exploited and marginalised in the market. This kind of development so called is 'banal and export led' Bond (2016:8-9). The task of this chapter is to amplify these contradictions marked by the separation of economies into enclaves of

dominant-subordinate sections or dualities, and locate them within the historical processes of plunder, dispossession, exploitation and exclusion that have dominated Africa given the vantage point of hindsight, and within the locus of world systems discourse.

The Historical Development of the Dual Economy

The duality of the economic system predominant in Africa outlined above is deeply embedded in the historical processes that characterize exploitative unequal exchange between North and South's axial division of labour. Marx aptly captures this dichotomy when he states, in describing the exploitative relationship engendered by capitalism that:

The former sort accumulated wealth, and the latter sort had at last nothing to sell except their own skins. And from this original sin dates the poverty of the great majority that, despite all its labour, has up to now nothing to sell but itself, and the wealth of the few that increases constantly although they have long ceased to work. (Marx 1887:507)

Thus the dispossession and impoverishment of the majorities is not an anomaly to capitalist society, but rather expresses the development of, and expansion of that system. This dichotomy does not occur merely at the micro level of society, within set geographic boundaries, but extends globally in a capitalist world economy. The single world economic system which finds expression through the spreading tentacles of transnational corporations and international financial institutions, and is supported by governments in the developed world, is 'logically superior to the units that constitute its parts, or national economies' (Amin 1990:192). Therefore in peripheralised capitalist society there is always the duality of the dominant capitalist world economy set against dominated national economies on the macro level, and the capitalist set against the proletariat within the state system or on the micro level. This dualism exists in a state of perpetual contradiction, and in fact the capitalist world economy is a predatory, overbearing system involved in a Manichean relationship in which it dispossesses, exploits, suppresses, preys on, and encourages the extension of structural weaknesses in subservient national economies.

In the Africa context, the dual economy did not appear on the continent until as late as the colonial contact, because it is the colonial contact that ushered in capitalism and the modern state system, and because economic dualism is a phenomenon only unique to the capitalist system (Amin 1990). Precapitalist modes of production, which characterised societies in precolonial Africa, were

not structurally organised for production with the aim of gain, and they did not commodify what occurred naturally, that is, land and labour. Amin (1976:31) has observed that the two essential conditions requisite for the development of capitalist is the existence of money capital and proletarianisation. While Amin (1976:31) does confirm the presence of money capital in precapitalist society, the non-existence of a social class excluded “from the village community” inhibited the development of capitalism because “a supply of free and available labour never occurred” Amin (1976:31). Malinowski in Polanyi (2001:272) has illuminated this point. “The whole tribal life is permeated by a constant give and take, this is the outcome of the principle of reciprocity which pervades every relation of primitive life’. We thus find in virtually every precapitalist society in Africa this principle replicated such that reciprocity and redistribution to non-producing parts of the population ensured that there was no drive for gain and exposure to negative economic vicissitudes did not occur on an individual basis. In such societies, the market was merely ‘incidental to social life’ (Polanyi 2001:43) yet in the capitalist economy, the converse is true, that the market dominates social life. By referring to markets as merely incidental, Polanyi implies that in precapitalist society, the market was severely restricted from dominating social life yet in a capitalist society “ a self-regulating market demands nothing less than the institutional separation of society into an economic and political sphere” where the “market forms an absolutely vital part of the economic system” Polanyi (2001: 72) so that the survival of the whole society subsists on money incomes obtained from the barter of its labour. The history of capitalism has been a history of the systematic centralisation of the market system as the medium through which social transactions are executed. As a result, markets have displaced and now dominate every element of social order so that the rudimentary currency through which society transacts in is the profit motif.

The principles of reciprocity and redistribution were central to Precapitalist society so that ‘the individual in primitive society is not threatened with starvation unless the community as a whole is in a like predicament’ Polanyi (2001:163). Precolonial societies in Africa therefore possessed mechanisms for social protection, so that inequalities were regulated by a system of redistribution, while social safety nets ensured that no part of a single society was allowed to descend into indigence without the system compensating. This self-correcting mechanism ensured that the duality of wealth and poverty could not exist in any significant proportion, since social order was the great equaliser. Such societies, wired to an economic system based on reciprocity, encountered the market system, which is predicated on the principle of primitive accumulation, from a position of weakness, making them wholly incapable of negotiating the intricacies of a system which resultantly relegated them to the

fringe. But because 'mercantilism by its very nature demands the command of national economies to sustain the market system' Polanyi (2001), it entailed that those on the fringes were effectively drawn into the vortex of the market system, while their survival became desperate in the face of 'maximum money gains' Polanyi (2001:68)

Colonialism thus reorganised components of society in order to meet the needs of capital accumulation so that there emerged a great line of demarcation between the owners of the means of production and the labourers, between the capitalists and the proletariat masses. Magubane describes colonialism thus "the settlers came as robbers and enslavers and they stayed as coloniser". The robber having completed his heinous crime proceeded to impose on both the vanquished and himself the obligations of respect for property rights, without which capitalism could not flourish. But this act can never conceal the plunder and looting of a people's resources. This demarcation also carried racial overtones as a necessary instrument for the advancement of that social system of economic apartheid. 'A society may perpetuate social inequalities and injustices far more effectively when the maldistribution of income is buttressed by phenotype' creating 'racially structured capitalism' Magubane (1986:13). What then ensured was the dramatic separation of socio-economic processes that privileged one race over another, which allowed for an exponential expansion of capital accumulation for the dominant racial class over the African. The African was made to fit into this alien system through dislocating him from his modes of production. While the capitalist world economy was exponentially expanding from primitive accumulation, the African economy, in the process of being subsumed, dwindled dramatically to a point where it was hardly discernible. Mamdani (1996) in Hemson (1998:246) states that the extension of market relations across colonies inevitably resulted in the dissolution of prior modes of production. With this dissolution also came the loss of precolonial tradecraft and knowledge systems that had sustained African communities for centuries hence, so that apart from the physical dislocation that occurred, there was the systematic rereading and representation of a people's history whose aim was the total erasure of a peoples' knowledge systems.

The colonialists came only short of completely annihilating the African because of the need for labour. Thus settler wars only 'stopped at the point where their logic might have been detrimental to the labour needs of imperialism' Magubane (1986:10) The labour demands of the colonial administration also forced it to retain in most part the general structural outlines of African societies for the purposes of control, in what has been termed 'decentralised despotism' Mamdani (1996) in Hemson (1998:247) and in so doing the dual economic system was entrenched. For example:

Chiefs were reinforced in their power over the scraps which remained. (In reference to the land and territorial jurisdictions that had been reserved for the Africans) some of these were just sufficient to sustain not a tribal mode of production but a modicum of a base for traditional family life and custom. The African migrant held on desperately to these plots as a relatively clean family home (Mamdani (1996) in Hemson (1998: 246).

There was thus a tendency in colonies for the colonialist to cede some degree of administrative authority within set boundaries without threatening the structures that supported economic plunder in the colony. The authority of the African was thus recognised in so far as it was instrumental to the maintenance of coherence within his social sphere. It may be argued that the current African state invariably assumes the same role as that held by traditional leaders in colonial times, that of enjoying authority over mere scraps that remain, even at national level. Mamdani (1996) in Hemson (1998:242) has also noted that the key defining features of the African colonial state was its Janus-face. It possessed two sides of a 'single bifurcated state partitioned along the rural and urban divide but run and controlled by a single hegemonic authority'. But above this single hegemonic authority was another higher authority. This hierarchical system subsists to this day.

The colonial governments operated in a dual contract, they reflected the economic needs of the various metropolitan economic actors, as mediated through political pressures on the government (both in metropolises and directly on the colonial administration) but as a substructure they had their own immediate needs to fulfil. Export production was needed to provide a tax base sufficient to cover the costs of administration (Wallerstein 1976:41).

It is this bifurcated substructure that created the nucleus of the independent African state, and like the duality embodied in the substructure, the contemporary African state plays second fiddle to the primary demands of the metropolises in the macro structural duality. The cross structure of the independent African state is composed of the fringe elements formerly controlled by traditional leaders under colonialism, coupled with the administrative component formerly run by settler governments. During colonial domination, the substructure or national economy was kept at minimum levels of functionality so as to provide for the survival of the Africans from whom came much of the labour. But in reality as Mamdani (1996) in Hemson 1998:246) has acknowledged, the colonial government was only able to provide for the 'capitalist class itself, a white middle class and a privileged working class, while imparting misery and degradation to the majority'.

The displacement that resulted from this bifurcated state created the two-fold spectacle of indigence and dependence. To the capitalist world economy,

Indigence was necessary because it became a vehicle through which cheap labour could be secured and exploited Polanyi (2001:117). Thousands had then to eke out a living on farms, mines and sweatshops manufacturing goods that could sustain the appetite of gain. Dependence on the other hand did not have to be solved but merely sustained because whereas indigence forced men and women to labour, dependence broke the back of whole communities and nations effectively securing for the capitalist world economy vast mineral resources and huge tracts of land even beyond the end of colonial occupation. Thus having successfully managed this heinous crime, legislative instruments were then summoned as secondary tools to guarantee property rights, to colonialists, including those in the realm of ideas, in what Marcuse (2009:12) calls the 'privatisation of reason'. This is because for capitalism:

A uniform foundation remains: the individual economic subject's free ownership and control of private property and the politically and legally guaranteed security of these rights. Around this one stable centre, all specific economic and social demands of liberalism can be modified (Marcuse 2009:5)

In so doing, the capitalist world economy prevailed in providing for itself sufficient amounts of labour and raw materials that have ever since fed its ever expanding appetite, while at the same time exposing whole communities to a brutal existence characterised by hardship previously unknown on the continent.

But the capitalist economic duality forms a disarticulate whole given to constant crises during expansion and contraction. Amin (2014:16) observes that capitalism's 'system never tends towards the realisation of any sort of general equilibrium, but is displaced from disequilibrium to disequilibrium in an unforeseeable manner.' It is in this context that revolutionary movements for independence should be viewed. With revolutions breaking out across Africa, 'the potential cost of colonial administration rose dramatically, both the direct costs resulting from the need to expand the bureaucracy for purposes of control and the indirect costs of potential appeasement.' Wallerstein (1967:48). Independence came therefore as the outcome of a people's struggle for restitution, restoration and self-determination, and as the consequent escalation of the costs of colonial administration. The Africans demonstrated a people's ability to push back the tide of imperialism and in consequence capitalism, since the people's struggle was as much about economics as it was about political self-determination. Sadly this revolution has remained incomplete, stagnated even, because the capitalist world economy has enjoyed some degree of success in bribing the ruling elites and those in academia into advancing ideologically warped theories whose basic outline is that development on the continent is

largely, if not wholly dependent on allowing greater leverage and access of transnational capital to the continent's resources. 'the phenomenon of the British ruling class buying off and politically corrupting some sections of the working class is well known and was commented upon several times in the nineteenth century' (Magubane 1986:12).

The advent of independence and self-determination for the Africans was ironically a double headache for the African and a relief for the capitalist world economy. The new African governments inherited that substructure of the local, minute and dysfunctional administrative arm of the colonial state, while the capitalist world economy largely retained control over the extractive component in which much of the wealth is vested. The African government had to suddenly create a functioning economy from a dysfunctional system that had been hand fed by white capital. There was also the challenge of retooling and reskilling the millions who have been denied access to education and other essential social services attendant to the barest basics of human needs. Independence strangely relieved the capitalist world economy of the burden of providing resources for the welfare state and of providing what Arrighi (2011) has termed 'overhead capital' beyond that which facilitates resource extraction. The consequences meant that more profits could be earned by manipulating sitting governments with "aid" so called, and foreign direct investment whose intent is often misconstrued in most circles as key drivers of development whereas it is merely capital seeking accumulation, giving away in the process token sums to save African governments from total collapse. In essence, the dual economy conceived in the colonial era has continued to exist, one feeding on the incapacities of the other.

The chapter has gone into this short historical narrative deliberately with a view to emphasising the distinction between these two separate economies and the attendant complexities, so that it can demonstrate the fallacy of ascribing certain economic dynamics occurring in either one of the two economies to the other. For example, neoliberal discourse seeks to collapse this duality into a single entity to conceal the duality thus negating the structural causes of inequality and its historical antecedence. This historical negation is deliberate.

Never has history been taken less seriously than now, when it is primarily adjusted to the preservation and service of a national heritage, when revolutions are held to be background noise or disturbances of natural laws, and when the determination of human happiness and dignity is derived over to natural forces ... if history were really taken seriously, it could all too easily remind men that this form is in crisis and that possibilities for changing it can be derived from the history of its origins (Marcuse 2009:16).

Thus the dehistoricisation of human experience is as essential a component of capitalism as is the security industrial complex that accompanies monopoly capital in its marches of robbery across the world.

The reality is that developments occurring in the capitalist world economy overlapping the national economy have often been ascribed to the national economy so that policy positions of international monetary institutions have been seized with dealing with deceptive statistics, while local governments have been chided for failing to manage economic growth when in fact these are developments occurring outside their sphere of influence. The money colouring the deceptively positive economic outlook for Africa is merely speculative foreign money in stock exchange markets or foreign investments that even the IMF's Lagarde has conceded is reaching dangerous levels Bond (2016:10) yet it has been read as the growth of national economies across Africa. Amin has correctly observed this anomaly stating that the increasing inequality in the social distribution of income is a cause of concern for the reason that:

The evolution of the system in no way suggests that by gradual expansion the privileged stratum will extend to embrace the whole population. Even when the rate of growth of overall income is very high, 7-10% the numeric growth of the privileged stratum remains small, the privileged stratum reaches a ceiling of some 20-25% of the population irrespective of the time prospect even if this be a century (Amin 1976:352).

Considering the above, it becomes critical in development modelling to adopt Polanyi's (2001:157) advice that 'the time rate of change compared with the time-rate of adjustment will decide what is to be regarded as the net effect of the change'. The time rate of change suggests that the current development model imposed on Africa is debilitating. What development theorists have therefore been trying to accomplish is the miracle of growing the capitalist world economy exponentially with a view to indirectly expanding hence positively affecting national economies. It is this myth that Amin debunks. The economic dynamics of the interchange between the capitalist world economy and national economies often confuse analysts and this only exacerbates the crisis by misinforming policy formulation and misdirecting responses. The problem of Africa is not that there is not enough wealth being generated on the continent, but that much of the wealth generated is outbound, so that no amount of expansion without reorganising patterns of capital flow can mitigate against this crisis, because it is indeed a crisis. Here is one example of South Africa captured by Newsweek of Dec 16 (1974) in (Magubane 1986:19):

The gold that everyone is talking about comes mostly from South Africa, where this year 400 000 blacks supervised by 36 000 whites mined about 729 metric tons, or about 23 million ounces, worth \$4, 2 billion. That is more than half of the world's total yearly output. Six powerful financial houses run the apartheid nation's 42 gold mines, and they make a good profit mainly because of the abundance of cheap black African labour...

And Magubane (1986:19) again notes 'the wealth accruing from the production of diamonds in South Africa has probably been greater than that which has ever been attained from any other commodity in the same time anywhere in the world.' Considering then the time rate of change obtaining from such exploitation, it is improper for Africa to continue on this path.

Without this kind of historiography that contextualises the impurities of the international economic system and the impact this has had on Africa, understanding the economic exclusion of Africa's majorities will be fraught with serious misconceptions and incorrect development modelling. Amin (1976:43) is less kind to this kind of misconception but chooses to term it 'neoclassical pseudo-theory' because, as he states, it only serves to analyse appearances not the full historic picture. Therefore, for Amin (1976:293) 'marginalisation occurs because in its pure model, capitalism is characterised by polarisation of social classes, the bourgeoisie and the proletariat'.

The Marginalised Majority

The phenomenon of marginalising majorities has proved a headache for Turshen (2004:45) who has argued that marginalisation as a working definition is only applicable to a minority group. This is to miss the point. The sort of marginalisation under discussion here is best contextualised by Amin (2014:28) 'the so called marginalised countries are, in fact, the super-exploited in brutal ways and therefore, impoverished countries, not countries located 'at the margin' of the system'. This kind of marginalisation occurs because within societies like Africa which fall in the periphery of capitalism, there always occurs 'a more or less rapid, more or less extensive decline in the material well-being of the population in the area from what it had been' Hopkins and Wallerstein (1982:127). Thus Amin has described in simple language this conundrum:

For capitalism... it is the existence of the Sahelian peoples that is 'irrational'. Since for capitalism, it would be more appealing if the Sahel had only uranium and not useless Sahelians.... Such is the logic of this world system for which Africa is still very exclusively a source of minerals (Amin 1990: 21).

When therefore in the context of the African setting capital is foreign owned, labour is unwanted and land is expropriated from natives, the perils to such societies cannot be overstated. Polanyi (2001:73) is not exaggerating when he describes this process as the demolition of society, and as he states, with 'the robbing of protective covering of cultural institutions, human beings would perish from the effects of social exposure, they would die as the victims of acute social dislocation through vice, pervasion, crime and starvation.' Such is what is currently being witnessed across Africa today. Whereas in pre capitalist society the market is merely incidental to society, in an extractive primary product based economy, what is incidental are the peoples who find themselves obstructing the full exploitation of the resources that fall within their geographical location. One finds therefore that Sub Saharan Africa's economically alienated majorities are faced with an unwanted future. It's a future in which they are expendable to the capitalist world economy, and a future they cannot endure to see arrive. Which begs the question; is it justifiable that so much wealth resides in the coffers of those who are least connected to the continent and denied those who are most in need of it?

On Economic Exclusion

The three key productive inputs of a market economy are land, labour and capital. To understand the level of marginalisation of a people rudely thrust into a market economy, it is necessary to analyse how they fare in terms of controlling these essential components. Labour gains wages for those who offer it, and is measured by level of employment. Land attracts rent, and the rent is enjoyed by the owner, or alternatively land is used for commodity production to meet the profit motif of the market economy. Control of land is measured by ownership and access. This includes mineral extraction along with exploration for hydrocarbons. Capital is the means by which land and labour interact to produce commodities for the accumulation of more capital. Those neo-colonialists who claim to own the means of production in Africa necessarily enjoy access to capital. It is this analysis of the Africa context in relation to these components that shall occupy the remainder of this chapter.

Land and the African Society

The conflict inherent to the land question between capitalism and other modes of production typical of precolonial Africa society is that for the former, land is merely a commodity to be battered on the market and exploited for capital accumulation, whereas for the latter, land represents the very survival of a people, so that its ownership and control falls within the domain of social

organisation. This argument is extensively dealt with by Marx (1887), Polanyi (2001) and Amin (1974, 1976, 1990). In the dispossessive and exploitative capitalist context, man (labour) and natural resources (land) are merely means in the capitalist mode of production Polanyi (2001). Much of the land in Africa was held under customary land tenure. It is important to point out from the onset that to describe customary land tenure as archaic is to misunderstand the working of social organisation because only within the capitalist system is land a commodity. Capitalism's quest for dominance demands that it disregards all alternative forms of social organisation that inhibit its expansion. Capitalism's drive towards obliterating all alternative forms of social organisation that are antithetical to its progress extends to knowledge systems, inspiring the rabid defence of liberalism against all intellectual, religious and cultural alternatives that fall outside the rationalism of liberal thought.

The logic of customary land holding is that 'the peasant enjoys access to land by the mere fact of belonging to a clan, he is entitled to a part of this clan's territory. Consequently proletarianisation, that is, the separation of the producer from the means of production, cannot take place.' Amin (1976: 14) Capitalism however demands that there be a wage labourer (proletariat) who must work at the threat of starvation for the capitalist (Polanyi 2001:216). To bring about the existence of the proletariat, the colonial system reorganised traditional landholdings in Africa by force of arms to dispossess the African and impoverish him, so that there began to emerge on the continent Polanyi's (2001) 'masterless man', the wondering proletariat divorced from his land. Ever since, the African has continued to be dispossessed and deprived of his right to land, and by extension his very being. The path of destruction since the carving up of Africa at Berlin in 1885 follows the geopolitical resource contours which roughly run along 'the African mining region which extends from the Cape to Kinshasa, the African oil region from Luanda to Lagos and the African agricultural region from Dar es Salaam to Massawa' Tshiembe (1999) in Baregu (2002:15). The march of capitalism into these regions has occurred concurrently with the impoverishment of the African. Thus besides the profit maximisation which wreaked havoc on the life of the African in terms of his economic survival, the African also suffered on the socio-cultural level when the destruction of the institutions on which his social existence had been based brought about his alienation Polanyi (2001:157). This systematic dispossession has continued unabated, so that in post-colonial Africa, we can still witness widespread land dispossession of the African for Agriculture, mining and speculative purposes. Most recently there has been a land rush on the continent dubbed the second colonisation of Africa.

The expectation that with the end of colonialism there would be an alteration of this status quo, so that land restitution in agriculture and resource

transfer in mining and other extractive sectors would occur has so far been bitterly disappointed. The threats of affirmative action on land issues made by sitting African governments over the past two decades across much of Africa have not been honoured. This has kept land tenure paradigms unaltered Wily (2011:1). Ironically, while land restitution in Africa has been bereft of redistributive policies, most states have been under immense international pressure from the donor community and international agencies representing former colonisers to further privatise land holdings, (Wily 2011:2) with an eye towards customary land tenure which has been the lifeline for Africa's peasant population. Land tenure security based on title deeds is associated with private investment WB (2014:5). This stands in contrast to the fact that only 10% of rural land in Africa is formally registered WB (2014:2).

Accompanied by land privatisation is the outrage of transnational land grabbing in Africa. The United Nations Economic Commission on Africa UNECA (2007) in Karlsson (2012:7) has noted that 70% of Africans and roughly 80% of the continents' poor live in rural areas and depend mainly on agriculture for their livelihoods. The report further states that agriculture is the main source of income for 90% of Africa's rural people and that out of 1 billion inhabitants, around 70% live and work on small family farms. It is these families that are now under threat from the new land grabbing currently underway. Karlsson (2012:7) has noted that farmland in Africa has recently been parcelled out to investors at alarming rates only rivalled by rates of expropriation attained by settlers during the colonial era, for widely similar purposes, that of resource extraction, in this case providing fuel and food needs of foreign nations Future Agriculture (2011:2). There have been many deals involving transnational companies and foreign governments guaranteed by renewable leases of 25, 50 or 99 years in return for small payments, Future Agriculture (2011:1). A 2010 World Bank study discovered that in 2010 alone, 45 million hectares of land were under negotiation for allocation to foreign corporations, while in 2009 alone 70% of the 32 million hectares allocated worldwide were in Africa. Future Agriculture (2011:2) states that the true figure could be in the region of 50 million hectares. The cause for such a rush is due to investors turning away from volatile 1st world markets to invest in more secure assets like farmland. Transnational Land grabbing has also been inspired by the global food crisis of 2007-8 which prompted many governments to seek reliable sources of food, Karlsson (2012:6).

So in essence the desperate drive to get land is intended at once again exploiting Africa to feed foreign countries with very little if any returns for the continent, and virtually nothing for the dispossessed rural poor who are further pushed to the fringes. Wily (2011:3) notes that the cumulative effect of this exercise has the ultimate potential of altering the existence of the peasant into

perpetual homelessness and wondering, unabsorbable in any social setting on the continent and reminiscent of Polanyi's masterless man. Celestino (2009) in Kachika (2010: 22) also noted that 'what are often presented and parcelled out as ownerless unused lands are more often than not the very source of survival and subsistence for the most vulnerable of communities from which they produce not only food but also medication, energy, material for shelter and grazing for livestock'. The major attraction is also that land on the continent is wildly undervalued and cheap Future Agriculture (2011:2). These new land grabs have been responsible for the displacement of approximately 80 million small scale farmers who have historically provided a substantial chunk of GDP Future Agriculture (2011:3). The most aggressive companies that have been foremost in grabbing land in Africa include Agri SA, an agro based company based in South Africa, while countries include but are not limited to Saudi Arabia, UAE, Qatar, Bahrain, Oman, Kuwait, Jordan, China, South Korea, Japan and India, along with those traditionally linked to Africa through colonisation most of who form the EU Friis and Reenberg (2010:10), Future Agriculture (2011:3). As an example, 'China's desperation for land in Africa stems from the fact that it has a 5th of the world's population yet it possesses only 9% of the world's arable land' Karlsson (2012:9), a similar trend across much of the middle east where many oil rich countries have very little access to arable land.

Mozambique has given away 10 million Ha in only 10 deals representing 13% of arable land area while Kenya has parcelled out land in the Tana river delta to multinationals from Canada to the detriment of 25 000 people in 30 villages, Friis and Reenberg (2010:10). Tanzania has also given away 640 000 Hectares (Ha) for sugar cane, jatropha and palm oil production Friis and Reenberg (2010:10) while DRC has given away 11 million Ha in only 6 deals Friis and Reenberg (2010:10) Substantial land transfers have also been noted in Zambia, Sudan, and Angola Wily (2011). Besides these, Ethiopia, Madagascar and Sudan have also recorded the highest number of individual land deals.

The world will soon look to Africa for food because 80% of global reserves of arable land are in Africa and South America Friis and Reenberg (2010:10). This fact entails that for the foreseeable future, the continent will remain as the central site of land or agro based capitalist expansion in pursuit of profit. It also means that the continent will remain the lifeline for food and energy needs for much of the world, so that greater land related speculative activity should be seen to increase on the continent. The downside to this is that without the right modelling, the continent's peoples will remain dispossessed and marginalised on the fringes while the plunder of their home progresses.

Africa has not fared any better in relation to structural inequalities occurring in mining and the extractive sectors. The World Bank (2017) notes that fiscal dependence on commodity based revenues for Africa stands at well over 50%

in major commodity exporters. From 2001 to 2014 extractive industries made up nearly 2 thirds of exports from African countries, oil and gas accounting for close to 50pc of total exports Punam *et al* (2017: preface). This would be in order if the profits accrued were directed back to the country of origin, but in most cases, because foreign corporates dominate these capital intensive sectors, much of the surplus does not find its way back. As such, there has been a slow pace of poverty reduction if at all. For example in Zambia, a major copper producer, the incidence of poverty remained virtually unchanged at 60% during 2000-10 despite a doubling of economic output in this period Punam *et al* (2017:3). Nigeria oil revenues increased almost 10 fold between 1965 and 2000 but real income stagnated and poverty and inequality increased Puman *et al* (2017:34). Studies have come to the conclusion that there seems to be a penalty for living in a resource rich country Punam *et al* (2017:10). This, considering lifestyle statistics encompassing Angola, Gabon and Nigeria set against resource poor countries. In the resource rich countries, literacy rates are 3.1% lower, life expectancy is 4.5 years shorter, and malnutrition among women and children is more prevalent by 3.7% for women and 2.1% for children Punam *et al* (2017:3).

The practice of parcelling out large tracts of land to foreign investors is not only a portent assault on the peasant and rural Africa, who are further marginalised, but on the development of the continent. Amin (1990:17) has attempted to project what ordinarily should occur during an agricultural revolution. Competition must gradually bring about the replacement of the peasants by big agrarian capitalists having the necessary capital to start the process of mechanization through concentration of land ownership. But he is quick to record that 'Africa has not begun its agricultural revolution without which any development is unimaginable'. This is because the settler colonialist cum commercial farmer has never been part of the organic development of an agrarian revolution in Africa in the same way the industrial outlay, meagre though it may be scattered across Africa cannot constitute the formative stages of an industrial revolution. This is because for either an industrial or agrarian revolution to occur apart from other preconditions, capital must remain within the territories within which it is generated Amin (1974:257) so that in seeking more accumulation it leads to the expansion of the economic system and a transformation of the technological means used in the production process, that is, mechanization. When therefore surplus capital continues to be spirited out of the system, as is the case in Africa, there is a stagnation that constricts the mutation of the production system to higher and more sophisticated forms and a restriction of economic activity to primary production of raw materials for export. Foreign capital's ultimate aim in Africa is the repatriation of profits to the core, where investors expect a dividend from their capital, and it is inconceivable to redirect this profit and retain it for the development of Africa

(Amin 1974: 257).

Labour

The fiction of labour as a commodity Polanyi (2001:230) is nowhere else a crushing reality as in Africa. As has been previously discussed, transnational capital created the concept of the labourer by dislocating the peasant from his land, thus depriving him of his means of survival. Over time, and this is especially true for Africa, the growth of population in relation to the expansion of the commercial enterprises where labour was required was asymmetrical, since population growth tended to be faster than the rate of expansion in industry. In Africa, the majority of the people have been turned into wage earners who tragically cannot find employment because the structure of concentrated monopolistic enterprises suitable for capital accumulation of the kind obtaining in Africa does not require abundant labour. The number of unemployed has continued to rise without recourse to alternative means for survival. These conditions are particularly attractive to capitalism because the 'weight of unemployment ensures a minimum remuneration of labour that is relatively rigid' (Amin 2014:26). Had there been a corresponding increase in the number of industries requiring intensive labour, this phenomenon would not become a reality, but because the colonialist cum foreign investor is only concerned with investing for high returns in a restrictive environment which does not allow for the expansion of industry, Arrighi (1967:25) the sort of industrial outlay capable of absorbing this abundant labour does not occur.

The International Labour Organisation [ILO] in Hilson and Osei (2014:3) describes the labour unemployment crisis afflicting Africa thus, "Over education and over skilling co-exist with under education and under skilling and increasingly with obsolescence brought about by long term unemployment. Less than 10pc of the labour force is made up of wage employees in the formal economy".

Golub and Hayat (2014) have offered an alternative explanation to the ILO argument, stating that lack of demand for labour rather than worker characteristics is the main reason for pervasive underemployment in Africa. This appears a more plausible cause. Africa's working population is estimated to have reached 492 million in 2012 ILO (2013:2), yet the informal economy employs up to 90% of the working age population, 70% of which are employed in Agriculture AFDB (2012) in Ayele *et al* (2017:24). Amin (1976:353) notes that the border zone between unemployment and employment is widening in Africa to the extent of removing all meaning from the official statistics on unemployment. The definition of informal employment for example can be emotive. Governments often broaden the definition so that it encompasses

virtually every kind of human activity for the convenience of statistical output, but in reality, unemployment in most Africa states is staggeringly high.

In rural areas, the peasant who was dispossessed off his land and resettled on infertile unproductive land grinds a pitiful existence enduring hardships not much different from that experienced under slavery and his offspring is left with no other option but to track to the cities. The incidence of exponential rural emigration has therefore been due to a 'desperate flight of populations seeking an escape from famine, rather than one that occurs inspired by a demand of labour in the urban areas' Amin (1990:18). Thus, we encounter the unemployed urban slum dweller. The urban slum dweller has become a reality because of the failure of the rural peasant farmer to produce enough to sustain the family unit. The peasant is put in such a position because his ability to produce is severely curtailed by his economic circumstances and the hostile environment he was thrust into by colonialism. This slum dweller is unemployed but ekes out a living engaging in all sorts of petty trading but often descends out of desperation into crime and prostitution. This kind of migration gives rise to new and ominous challenges because as Amin (1990:20) states 'urbanization without industrialization can only be parasitic and disastrous'. Africa now has more than 300 million urbanites, most of whom are unemployed slum dwellers (Toulmin 2009:30).

There is effectively a floating majority desperate for sheer survival. Evictions from cities may hide the slum dwellers out of sight, but it does not resolve the unemployment crisis. These slum dwellers are driven away out of sight yet no serious efforts are made at bringing about real transformation. But as experiences in Zimbabwe, South Africa and Kenya have proven, this group has continued to grow and has developed clout over the years to the extent that they have transformed into a political sub grouping that sitting governments can ignore at their own peril. These slum dwellers unsurprisingly now include graduates unable to break into the formal job market. These have been increasing exponentially in number. Xenophobic attacks in South Africa directed at nationals from Zimbabwe, Malawi, Mozambique and Nigeria have demonstrated the intensifying desperation of this demographic group across borders. It also demonstrates a lack of ideological clarity among leaders of these xenophobic movements because if the idea is to fight for an ever dwindling cake while retaining the status quo created in the interest of transnational capital then their circumstances are sure to remain unimproved.

There is also a gender slant to the crisis, because there occurs a feminisation of peasant labour to subsidise labour reproduction for the urban areas which further exerts a heavy burden on womenfolk on the continent. This burden is especially grievous because of the increasing decline in peasant food output, and the unavailability of employment in urban area as Rowden (2013) in Bond

(2014:10) has observed, 'Africa is deindustrialising and losing ground in labour intensive manufacturing'. Women and children have often been the most exposed and bear the brunt of dysfunctional economic systems. The structure of the African family system has been severely dislocated in this regard. When huge communities are deprived from earning and spending income the consequence is the stifling of commerce and industry in and among states in Africa. As a result, Africa's governments are pressed to provide social safety nets which invariably put a strain on national budgets especially in contexts where the majority of beneficiaries should ordinarily be economically active.

Labour Demand and Youth Militancy

Whereas the colonial system favoured white supremacy, the post-colonial system thrives on the rewarding of elite compradors who have replaced white racists as the representatives of empire on the continent. Under such conditions of widespread unemployment, as Bond (2016:11) observes, even the prosperity of these comprador elites is at a great risk both in the long term and short term. The comprador elite has an interest in sustaining this system because 'the marginalisation of the masses is the very condition that enables the integration of a minority into the world system and guarantee of growing income for that minority' Amin (2014:26), but these structural inequalities breed general militancy among the youth and the proletariat. Bond (2016:12) states that the continent's labour activists for example are easily the world's most militant.

Africa is now the most youthful region in the world, with the number of youth as a proportion of population exceeding 75% in 2015 and half of the population aged under 25 years WB (2014:2) making Africa the 'youngest' continent WB (2014:preface). By 2025, Africa will be home to a quarter of the world's young people Hilson and Osei (2014:3). Yet the downside is that, of this growing demographic group, upwards of 133 million youths on the continent are illiterate Hilson and Osei (2014:3) and many more are unskilled and largely excluded from productive economic and social life. This entails that economic prospects for this demographic group remain slim Golub and Hayat (2014:4). While those unemployed in urban areas face the wrath of government slum clean-up programmes, those who remain in rural areas find that there is an increase in the systematic violation of peasants' land rights by mining companies and agribusiness megaprojects.

Incorrectly skilled and craft incompetent youths incapable of negotiating the knowledge and economic landscape find it increasingly cumbersome to gain a foothold in any meaningful trade.

As a result, the disillusioned youth and middle aged African who daily sees his future receding into nothingness has begun to agitate for a greater stake of

a shrinking national cake. Youths often resort to radical leftist positions that put them on a collision course with sitting governments. Disillusionment with the ruling elite, who are often those who were former freedom fighters leading popular revolutionary struggles, has seen the majority support shifting to young and exciting opposition movements who largely have little to offer the electorate besides IMF and World Bank support accompanied with conditionalities reminiscent of the ESAPs of the 90s Bond and Manyanya (2002) while those with a radical reformist agenda join such parties as the Economic Freedom Fighters in South Africa. Alternatively, vigilantism, banditry, criminal enterprise and mercenary excursions result, as has been witnessed in Nigeria and other parts of West, East and Central Africa. Mkandawire has attempted to understand the emergence of rebel movements and has noted that when groups are frustrated from the failure of realising political aspirations, violent revolt is often the outcome Clapham (1998) in Mkandawire (2002:182). Alternatively rebel movements are also born out of reactive desperation induced by economic crises, such as those meted on much of the continent through IMF and WB imposed Economic Structural Adjustment Programmes (ESAP) of the 90s Mkandawire (2002:192) A sizeable chunk of the youth population has also chosen to migrate away from the continent into Europe and Asia where they face myriad fortunes, accounted for as brain drain.

The consequences associated with excluding large sections of communities from mainstream economic development are well illustrated by the upheavals that oversaw the overthrow of colonialism, because the glaring inequalities of that system was itself fodder that ignited a consciousness among Africans to revolt and seek its demise. Similarly, post-colonial African countries dominated by compradors and foreign capital whose intention is the continued draining of Africa's resources must be guaranteed of years of intermittent revolt and instability. Two possible outcomes will result from this strife. One is the decline into failed state status along with an increase of authoritarian military backed governments witnessed in some parts of Africa, and the second possibility is the victory of pro-poor administrations, the consummate victory of social democratic governments with a clear path of delinking from the core states following the Chinese model. The obvious fact is that the current state of economic exploitation is not only unsustainable but also a danger to the long term prospects of the continent.

The glaring reality of this danger has prompted transnational capital to impose the question of birth control in Africa, Amin (1976:357) despite the fact that 'no civilisation with a stagnant population has ever been progressive, because pressures on food have led to agricultural revolutions in the past'. Amin (1976:358). Birth control as a tool for population management is social Darwinism's solution to an overproduction of labour (man) under conditions

of low demand, in societies where Malthusian natural population checks have proved ineffectual. 'The important phenomenon of marginalisation which is entirely independent of demography manifests itself in the increasing gap between economic dynamics and population dynamics' Amin (1976:357). The capitalist world economy is intent on managing this gap by managing population dynamics.

Capital: Its Sources and the Implications

In peripheral regions of the world capitalist system in which Africa falls, capital exists in its most unsophisticated forms. Capital competing for dominance of the African state can be grouped into four broad categories, although in reality, the latter three categories act on behalf of the capitalist world economy. The first category is national capital, by which I mean capital in the hands of the national bourgeoisie. In the African context this tends to be severely restricted and small for reasons already discussed, which include the absence of a significant national bourgeoisie class, minimal wage labour which prevents the growth of this class and the oppressive presence of foreign owned monopolies in the economy, which dominate the space in which the national bourgeoisie should ordinarily occupy. The second category is Foreign Direct Investment (FDI) which is substantial and dominant through foreign owned monopolies but directed largely at the primary extractive industry although it does have a presence in the luxury goods sector. By way of illustration, FDI for Uganda, Cameroon, Gambia and Tanzania is in the region of 30pc of GDP while for Congo it stands at 66% and 60% for CAR UNDP (2017: 6). The third form of capital relates to speculative money managed by foreign banking institutions including International lending institutions the IMF and the WB. These play an important role in the extraction of surplus capital from Africa. Financial markets are deepening but largely as a result of foreign inflows that are reaching unsustainable levels Bond (2014:10). The effect of financial markets is that the 'financial investments or rather the investments in financial speculation continue to grow at dizzying speeds, not commensurate with growth in GDP (which therefore becoming largely fictitious) or with investment in real production' Amin (2014:22). The fourth is foreign aid which strangely plays a largely similar role to speculative money. The contradiction between foreign capital and national capital is summarised in Arrighi's (1967:25) discussion on Southern Rhodesia. Arrighi notes that 'private enterprise has a tendency to increase investment in response to, and not to induce, greater demand' whereas 'the national bourgeoisie had an interest in the expansion of overhead capital to foster the economic development of the country.' Arrighi (1967:25). In circumstances where foreign capital is dominant, as is the situation with most

Africa states, what then subsists is a condition of arrested development in which 'labour intensities remain by definition at or about the same levels for long periods, and technical improvements in tools or organisations are by definition few and far between and have few or no structural ramifications when they do occur' Hopkins and Wallerstein (1982:127)

The obstacle in the way of altering this state of affairs is that 'imperialism tends within a particular historical conjuncture to prescribe upon the dominated society broad parameters of political and socio-economic activity' Mandaza (1986:120). The capitalist world economy manages this system of predation by influencing policy in national economies, rewarding cooperation and punishing dissent. National economies have therefore to negotiate this complex terrain. Often, reforms by indigenous economies have been abandoned in the face of threats on the withdrawal of balance of payment support, or downgraded credit ratings, shocks to stock markets and bank runs along with currency crashes. These have followed closely in the wake of pronouncements of pro-poor reforms, wealth and property redistribution. Such shocks and upheavals have regularly and consistently been interpreted to mean the unsuitability of such policy pronouncements to fragile economies. Alternatively, the so called specific neoliberal policies required for macroeconomic 'stability', propounded by John Williamson in Bond (2006:11) carry the same function of prescribing parameters within which dominant states may operate. Fiscal discipline, reordering public expenditure priorities; tax reform; liberalising interest rates; a competitive exchange rate; trade liberalisation; liberalisation of inward foreign direct investment; privatisation; deregulation; and property rights ensure that imperial interests are hedged in and remain unaffected by developments in Africa. This includes limiting the space afforded the national bourgeoisie and the extent it can grow the national economy so that regardless of the ambitious drive to alter the circumstances of his fellow compatriots, the national bourgeoisie is by and large constricted from intervening for the upliftment of the marginalised.

National Capital

For most Africa countries, there is a dearth of national capital within the national economy owing to the narrow capital base in the hands of national governments with the capability of generating savings, Amin (1974:257) such that the absence of endogenously generated capital advanced at low interest rates has often been used as justification for the need to relax regulations for foreign capital to enjoy free reign. Governments have tended to overtax already vulnerable groups as a way to mobilise funds. The effect of such methods is that under severe economic stress, citizens can severely erode the capacity of

the state to extract tax revenue by 'withdrawing from state controlled markets' Mkandawire (2002:196) further weakening the state. The instability is further exacerbated by the export dependency of these economies. The ebbs and flows of national economies are so exposed to the whims of foreign capital such that 'some regions that were prosperous at one time, because the export product they supplied was of interest to the centre, later fell into hopeless decay when the centre's interest shifted to a different product' Amin (1974:178). The development of the national economy largely relies on the state because it enables for the accumulation of savings required for the development of the national bourgeoisie.

A major transformational shift that occurred to national capital post-independence occurred as a result of the IMF and WB imposed Structural Adjustment Programmes (SAPs). The overhead capital that had been developed by settler governments in most Africa countries composed of parastatals ensured that independent states had some leverage by way of service provision and employment creation for the citizens. The SAPs through the imposition of privatisation effected the transfer of ownership of these companies into the hands of foreign monopoly capitalists. This resulted in the shrinkage of the African state and by consequence the reach and potential of national capital.

In most of the single commodity economies or rentier states in Mkandawire (2002:196)'s categorisation, huge amounts of capital are concentrated between a few conglomerates. These companies most of who are transnational corporations extract huge volumes of undervalued raw materials, and export large amounts branded as profits to their home countries. Illegal externalisation is also rife and very little amounts find their way into government coffers. These amounts are easily wiped off in social spending. Corruption also creams of large amounts. To the extent that very little remains for capital projects and real development oriented outputs.

The futility and pitfalls of building national economies based on largely privately owned external capital with the hope of realising balanced development cannot be over emphasised. The implications of having the majority wealth in the hands of foreign capital are far reaching. This is because of the 'competition between capitals' Amin (2014:16). Foreign capital has no incentive to and does not possess sufficient benevolence for aiding the development of a national bourgeoisie because of its drive towards monopoly. A growth in the national bourgeoisie entails the increase in competition for land, labour and capital where the national bourgeoisie would lay a greater claim of entitlement ahead of foreign investment. Followed to its logical conclusion, over time, the balance of forces would shift so that the national bourgeoisie would at last outgrow his boundaries and extend his tentacles into foreign markets reversing the imperial tide in the process. The Asian examples give credence to

this argument. The only solution available to Africa is the systematic indigenisation of its economies. This will have the double effect of including the majority of citizens in broad based economic activity and increasing local capital chasing huge investment opportunities that remain unexplored and subject to speculation. Food systems for example will become ever more contentious as population expansions continue to put pressure on production methods, so that Africa stands on the cusp of an Agricultural revolution that must be harnessed to transform the continent's fortunes.

The obvious irony is not lost to the objective critic, in that what we now find prevailing on the continent is a state of existence where the very survival of most states leans heavily on the benevolence of foreign capital in the form of aid. African governments, having failed to successfully re-organised the ownership of the means of production, have conceded greater autonomy to the transnational economy and granted it scope and leverage. There has also been a tragic misidentification of the extents and reach of transnational capital. Some countries have for example promulgated policy documents suggesting that different sources of this kind of capital may be more benevolent than others, such as the Look East Policy in Zimbabwe and the general wholesale acceptance of Chinese aid. As those in Zimbabwe have recently learnt, the Chinese are just as prolific in primitive accumulation of capital as their western counterparts.

Predatory Foreign Capital

As discussed above, the primary aim of foreign capital is the export of surplus capital to its home countries at the expense of capital expansion in the exporting region. According to the AFDB (2013:1) Africa lost in the region of USD 1,024 trillion for the period 1980 to 2009 in illicit financial flows. This translates to about USD 1,146 per person for the rest of Africa and USD 2000 per person for Southern Africa. West and central Africa lost USD 494 Billion, while Southern Africa lost USD 370 billion, amounts the bank insists are understated due to missing data. Nigeria Egypt and South Africa suffered the most haemorrhage. 'Capital flight constitutes a diversion of scarce resources away from the domestic economy which ultimately undermines distribution of wealth undermining growth and exacerbating income inequalities' AFDB (2013: 1-3). illicit flows take the form of 'corruption kickbacks, tax evasion, funds earned legally but transferred in violation of exchange control regulations among other corporate crimes,' AFDB (2013: 1-3) in the process prejudicing the continent of huge sums. These figures cover illegitimate sums, which exclude legitimate profit repatriation, although in this context the legitimacy of expatriating excessive amounts of profits must be brought to question. Bond (2016: 1-2) has declared for example in the context of South Africa that there

are frightening levels of capital flight occurring. He states that foreign companies are draining away profits far faster than they are reinvesting or South African local firms can offset, so that during the first half of 2016, net resource outflows had reached R174 billion, while the country's external debt has soured to R2 trillion from below R100 billion in 1994. Culprits behind these transactions include transnational mining and smelting companies Lonmin, Anglo America and Glencore among others. Effectively foreign capital harms the developmental aspirations of developing countries.

The Nationalist and Pan-African Projects

The nationalist project across much of Africa has struggled for definition and ideological clarity. The majority of post independent states in Africa had a dalliance with Marxist Socialism to which they paid lip service in large part. As their revolutionary zeal was watered down by the end of the cold war, Marxist Socialism was abandoned in favour of free market economics. The quenching of the revolutionary appetite as articulated within socialism, and the attendant disillusionment that followed in the wake of the destruction caused by free market economics has left most governments marooned without an ideological alternative to the two. What often subsists is a fractured state struggling to keep together ethnic communities owing to the state's inability to dispense national development projects. This originated from the abandonment of reformist doctrines by former liberation movements that inherited the capitalist colonial state because some of them had been bribed by white capital to defend the status quo, wildly enriching themselves and their families in the process. 'Capitalist development ...is an obstacle to national crystallisation' Amin (1990:92). One clear example is the franc zone in former francophone Africa in which financial management of these countries is virtually run from France Amin (1990:144). Opposition movements that have emerged in post independent Africa arguing for a redefinition of the nationalist project have unfortunately embraced foreign capitalist elements because of their lack of ideological clarity, but also because transnational capital has been quick to preempt these movements by hijacking their leadership in what Bond (2006:131) terms 'counter-insurgency'.

Like the national economy, the political systems in Africa are restricted to particular spheres that are unable to threaten in any significant way the transnational economy which, by virtue of the indirect political power it possesses has brought about this cordoning and parallelism. This effectively allows the transnational economy a free reign to run rampant in its accumulation agenda. Often what further fuels corruption is the defeatist attitude that dominates thinking in both academia and political discourse. Neo-liberal

propaganda often tends to amplify cases of corruption among African ruling elites to push forward the shallow claim that corruption is central to the collapse of the national economy. Thus political contests for national leadership in Africa focus on narrow definitions on why incumbent governments fail to transform material conditions of populations. These contests assume the posture of desperate life or death battles that become violent and ultimately further weaken the nation state. In the final analysis, with each electoral contest, most Africa states emerge weaker and more fragmented. To right this anomaly, Amin (1990:93) proposes that 'the absolutely first requirement in material action is a development of the forces of production and a raising of living standards of the great mass through a dual agricultural and industrial revolution, for which colonisation has done no groundwork.' In essence the infrastructure both physical and ideological currently in place because of capitalism will require radical realignment to suit this rejuvenation project.

The failure of nationalist projects directly impact on the pan African question. Amin (1976:238) has dealt with the pan African question. He argues that the disarticulation of the national space has negatively affected integration into the unity of nations because 'integration in the space dominated by the metropolises disaggregated the embryonic organisation of the national space'. Amin (1976:240) has also conceded that if this space is 'dominated by foreign capital, it will have no developmental effect of itself, but will, on the contrary, have the effect of accentuating the inequalities.' Any serious developmental efforts in Africa must therefore be premised on the reclamation of this space as a precondition of the development of the continent.

Conclusion

The marginalisation of Africa's majorities is structural, and any meaningful attempts to bring about redress must address these structural imbalances. The task of transforming Africa to reverse the state of marginalisation of its majorities is formidable but not insurmountable. It is incumbent upon its intelligentsia to abandon the neoliberal framework for a more holistic political economic narrative that appreciates the historical realities that have undermined development on the continent. There must be deliberate efforts on the part of national governments to systematically create and grow a nationalist bourgeoisie class which own and control the means of production to direct capital accumulation inwardly for organic Agricultural and Industrial revolutions to occur. The role of foreign capital must merely be complimentary to, and not central to the development initiatives of the continent. Baring these circumstances, it is inconceivable that an inclusive growth projectile can emerge from a system where the means of production are foreign owned, capital surplus

is prone to flight in favour of transnational capital, and the nationalist and pan Africanist project is in a state of arrested development.

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“Investors” or Looters? A Critical Examination of Mining and Development in Africa

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Introduction

It has been argued that mineral endowment in Africa is a “resource curse” rather than a blessing mainly because of the corrupt collusion of African political elites and some of the so-called “investors” in the mining sector (Li 2013; Mabikke 2012; Bekele 2017). Africa therefore continues to struggle with developmental issues. A significant chorus for the need for foreign direct “investments” (FDI) and the opening up of “markets” to improve African economies thus exists (Claassen, Loots and Bezuidenhout 2011:2). Such rhetoric has led to the pouring in of foreign capital and an “investor” rush disguised as FDI in the mining and other sectors of the African economies, a process that has been described as a new neo-colonial and imperial rush for natural resources by foreign companies and governments (Hall 2011; Mtapuri and Nhemachena 2017). Massive multinational companies have been rushing in Africa to make “deals” for what western neo-colonial liberals describe as “cheap”, “unutilized”, “idle” land to grow crops and extract minerals. For instance, in the period between 2008 and 2010, the so-called “investors” had managed to steal about 53 to 61 million hectares in Africa, an area that is about the size of Ukraine (Inclusive Development International 2017:7). Such “investments” have created some economic benefits for Africans such as job creation, infrastructural development, increase of tax revenues and other benefits, although many international corporations have largely looted resources in Africa without significant, inclusive and lasting local developmental benefits. Thus, while we accept that such land-based “investments” in mining, farming and biofuels have brought some developmental gains to Africa, largely, these international corporations have looted African resources. This has resulted in massive land grabbing, eviction of communities, illicit flows, poor salaries for mine workers, environmental damages, manipulation of local traditional leadership structures, corruption, ghosts towns after closure and there has hardly been any value addition/beneficiation to create local jobs (Economic Commission for Africa 2009:3-5; Menzel 2015; Chikwanha 2016; Inclusive Development International 2017; Warikandwa *et al.* 2017).

There is evidence that the so called “investors” in Africa, whether Chinese or Western multinational companies are largely indifferent to the local socio-economic and political environments in Africa and that they are often largely geared towards extracting minerals, no matter what the consequences are to local people (Menzel 2015; Inclusive Development International 2017; Laufman 2010). “Investors” in the extractive industry, whether Chinese or Western, are often linked to dubious “deals” characterised by deceit, secrecy, confidentiality clauses that stop community members from accessing valuable information, land grabbing, collusion with government officials or traditional leaders, kickbacks and corrupt activities (Sibaud 2012; Laufman 2010; Menzel 2015). The World Bank and other western institutions, together with some giant Chinese companies have been at the centre of this land grabbing massive storm by enabling/financing the so-called “investors” to grab as much land in Africa for farming and mining of minerals (Mtapuri and Nhemachena 2017). In the end, Africans are mostly losing their lands and livelihoods (Mtapuri and Nhemachena 2017), in the name of FDI through evictions to pave way for large-scale mining and farming, without any meaningful compensation (Menzel 2015).

In other countries such as the Democratic Republic of Congo (DRC), Sudan, Sierra Leone and Zimbabwe there is some evidence that suggests that international corporations, be it from China or other countries, have been complicit in sponsoring terror and chaos to side with certain sections of politicians so as to loot resources (Laufman 2010). Such avaricious nature of resource exploitation that is associated with human rights abuses and destruction of traditional African structures (Mtapuri and Nhemachena 2017), whilst fuelling armed conflict in some countries, has often led to what is often termed as “blood diamonds” or “conflict diamonds”. Such conflicts are common in countries such as Zimbabwe, Sierra Leone, Angola, Liberia and other African countries (Global Witness 2006; Global Witness 2010). Although the issue of armed conflicts on minerals is complex, the avaricious transnational corporations have often shown some disdain towards local development and democratic efforts in Africa, but rather in most cases, they are largely interested in getting their way to extract resources, even if such exploitation undermines human rights and democratic processes (Warikandwa and Osode 2016). This chapter focuses on Chinese “investors” in Africa and other mining “investors” in Africa. This chapter argues for a bottom-up approach to mining wherein local communities ought to be respected and consulted properly by giving control over resources exploitation. There should be meaningful investments towards beneficiation, environmental protection and empowerment for mineworkers.

This chapter starts by raising the commonly stated positive impacts of FDI inflows in mining, but then some critical evaluation of these supposed benefits is provided. The next sections that follow show the negative impacts of the so-

called “investments” in mining, such as land grabbing, environmental damage, destruction of local livelihoods, the conflicts and the role of traditional authorities and governments in robbing local communities of their lands.

The (Mis)justification of “Investments” in Africa

There has been a lot of discussion about how Africa can liberate itself from poverty and underdevelopment. The western neo-liberals (foreign governments, “investors” and international institutions) also known as economic hitmen who have looted Africa for centuries, often bombard Africa with ideologies on the need for an increase in FDI supposedly to improve African economies (Perkins 2004; The Oakland Institute 2015). When such “investors” go to Africa, they often promise job creation, local economic development efforts, infrastructure development, corporate social responsibility programmes and other niceties in return for “land deals”. African governments are therefore often tricked into providing massive incentives to attract “investments” such as leasing land, providing gateway for resources extraction, allowing industrial agriculture, as well as relaxing labour and environmental laws (The Oakland Institute, 2015). However, research has shown that such promises often hardly materialise and that such “land deals” often lead to land grabs which have devastated African economies and local populations, while fattening the so-called “investors” (The Oakland Institute 2015). Indeed some substantial FDIs continues to flow into African countries, leading to large-scale land-based “investments”, *albeit* with mixed reactions, opinions and real consequences (Mpofu 2017:2-3). A good example is that of the Chambishi copper mine in Zambia that was resuscitated by the Chinese FDI. This led to the employment of thousands of Zambians and other infrastructural projects, such as roads, bus shelters, public recreational facilities, as well as the provision of money for local education and women empowerment, *albeit* with poor working conditions (Brautigam 2009:5-6). But, Brautigam (2010:45), defends the poor working conditions in Chinese companies by noting that these companies bring poor labour relations, low wages, inadequate safety standards and weak environmental protection because they are used to such environments back home in China.

In Sierra Leone, despite the criticism against FDI in the extractive industry, the entrance of two multinational ore mining companies increased the real Gross Domestic Product (GDP) reaching 15, 2 percent in 2012 and about 16,3 percent in 2013 (Zayid 2014:3 cited in Menzel 2015:6). In Sudan, the entrance of Chinese “investors” led to the generation of more electricity in Sudan, *albeit* with numerous cases of human rights violations and environmental degradation concerns (Laufman 2010: 48-49). By 2010, Chinese companies had been mining oil in Sudan and Angola, building much-needed infrastructure, such as roads in

Ethiopia, generating electricity in Kenya. Sierra Leone also saw some infrastructural projects and the development of tourist industries by the Chinese, and some Chinese companies in Kenya and Nigeria were servicing mobile phones, as well as treating diseases in some cases (Adisu, Sharkey and Okoroafo 2010:4-5). By 2008, China, through its resource-for-infrastructure model was financing the much needed infrastructure, including railway lines, roads, hydroelectric dams, airports, schools and clinics in DRC in exchange for copper and cobalt concessions, while through its Export Import Bank of China (EXIM) Bank, China has extended loans for commercial projects to 35 African countries (Schiere 2011:5).

While it is often widely claimed that “investors” in Africa help to grow the economy by creating jobs, infrastructure, improving livelihoods, providing funding to improve the education, health and skills development for the employees as part of their corporate social responsibility (CSR) agenda, there is hardly any justifiable compensation to locals who suffer evictions. Local people suffer joblessness or poor labour conditions, diseases, torture, rape, poor compensation and environmental degradation - and there is very little value addition in African minerals (Economic Commission for Africa 2009:3-5; Inclusive Development International 2017). In the Sierra Leonean case for example, there were high hopes that the inflows of FDI would lead to tangible material benefits. However, in spite of the small benefits, it is evident that the entrance of farming and mining multinationals is regressive for the local development of Sierra Leoneans. By 2015, the everyday life and survival of local communities had become even more difficult and especially because the multinationals had colluded with traditional leaders and government officials to loot minerals (Menzel 2015:17-18). In the midst of protests against the so-called “investors”, the government officials in Sierra Leone (who are linked to bribery, corruption and co-opted by “investors”) often describe locals as ignorant people who are not educated and patriotic enough to understand the benefits of FDI (Menzel 2015:18).

The view that FDI inflows in mining lead to local employment is also misleading because most local workers work in appalling contexts that are similar with slavery conditions. There are also reported cases of racially-inspired ill-treatment by “investment” companies in some cases, while the kind of jobs that locals often get are menial, poorly remunerated and in some cases workers are not sought from local communities (Menzel 2015; Human Rights Watch 2014; National Association of Professional Environmentalists 2012:18-20; Warikandwa and Osode 2016). In South Africa, some former mine workers who were often dismissed or abandoned by mining companies because of medical incapacity are suffering from silicosis, an irreversible and incurable although preventable disease caused by inhalation of crystalline silica dust (Jephson

2015:11). In spite of making massive wealth, most of the goldfields companies appear to be elusive and of little help to the impoverished ex-mineworkers and the ex-mineworkers are literally so sick and basically waiting to die (Ibid).

Therefore, the colonial legacy in mining wherein minerals are extracted to benefit western nations and transnational corporations (at the exclusion of Africans) has not changed after the independence of many African nations (Economic Commission for Africa 2009:3). The entrance of the Chinese mining companies as “investors” in Africa has worsened the mining patterns and sparked fears of China colonising Africa (Igbinoba 2016). China’s increasing presence in Africa has been so strong that the former colonisers in the West, including Europe, have been increasingly becoming jealous as they fear that China would outcompete them in the race to loot natural resources in Africa (White 2014; Alao 2014). It is interesting to note that although Western powers have described China as a “rogue donor” and “unscrupulous investor”, the Western powers are uncomfortable, not because Africa is plundered, but because they are losing contracts and favour (from African governments) to Chinese banks and companies, as most leaders in Africa prefer unconditional Chinese “investments” (Bautigam 2009:12-13). Thus, Africa is slowly becoming the battleground for China and Western powers in their race to scramble African resources.

A study by Chen, Dollar and Tang (2015:3) has demonstrated that although western “investors” shy away from politically risky countries with poor governance, property rights and rule of law, while Chinese “investors” are indifferent to such, both Chinese and Western “investors” are attracted to larger markets and countries with natural resources. Most importantly, one must note that, the argument that the so-called “investments” in Africa are largely detrimental to Africa’s local development. The next section discusses the Chinese “investments” in Africa, with a view to understanding the developmental impact of such “investments”.

Chinese “Investments” in Africa

Due to its hunger for energy and resources (raw materials) owing to its industrialisation, the Chinese companies have invested heavily on extractive industries in Africa, using the resources-for-infrastructure model or the “Beijing Consensus” (Brautigam 2009). The “Angola Model” or the Chinese-Angola approach to trade, wherein there is a direct exchange of cash for resources, without any conditions attached concerning democracy, human rights, social or environmental standards has been the prime method for Chinese “investments” in Africa (Laufman 2010:14). The flows of cash from Chinese “investors” for infrastructural projects, aid and trade have been welcomed by most African

countries (Brautigam 2009), especially the despotic/dictatorial regimes, as Chinese “investors” do not worry much about domestic issues of African countries, for as long as countries are willing to accept the “One China policy”. The “One China policy” requires countries to recognise Beijing as “China”, at the exclusion of Taiwan in order to be allowed to get Chinese aid and engagement (Brautigam 2009:150; Igbino 2016:47; Brautigam 2011:3). Thus, most African countries have accepted Chinese engagements in trade, “investments” and aid partly because they were growing weary with the neo-liberal western kind of approach (“Washington Consensus”) to development that was attached to many conditions and restrictions (Blair 2007). The Forum on China-Africa Co-operation (FOCAC) that was held in Beijing from October 11-12 in 2000, which was attended by 44 countries detailed on the China-Africa engagement/co-operation, including “investment”, financial operations, debt relief and cancellation, agricultural, natural resources and energy, education and multilateral issues (Brautigam 2009:77; Claassen, Loots and Bezuidenhout 2011:2).

In her works, Brautigam (2009,2010,2011) persuasively argues that some of the negative criticisms against China are sometimes exaggerated and misinformed, but as we will show, research reveals that unconditional Chinese “investments”, especially in Sub-Saharan Africa hardly benefit the local communities (skills development). There is no doubt that Chinese presence, whether in the form of aid, “investments” or trade, has helped African countries where the western powers could not help, such as building the needed infrastructure, providing debt relief, providing employment opportunities for Africans and other developmental projects (Brautigam 2009). However, this chapter will still demonstrate that Chinese presence is largely detrimental to Africa’s local development. Chinese “investors” are notorious for worsening or being indifferent to issues such as transparency, corruption, environmental degradation and human rights (Laufman 2010), but this is not to say that western powers improve issues such as transparency, corruption, environmental degradation and human rights. Thus, political risk, conflict or violence, encourages Chinese FDI rather than discouraging it, which shows that natural resources are usually the likely motive for Chinese “investments” in such cases (Buckley Clegg, Cross and Liu 2007:505-506).

For instance, during the Sudanese civil war, an oil rich country, the so-called Chinese “investors” were present in Sudan, while some countries and businesses refused to “invest” in Sudan because of the conflict. China, together with Russia were accused of supplying government-sponsored militia with military weapons such as helicopters, bombers and arms to attack civilians. The main reason for China’s presence in Sudan was oil because by 2008 China was Sudan’s largest trading partner accounting for about 56,3 percent of Sudan’s exports. The

Chinese National Petroleum Company (CNPC) was then rewarded with a 40 percent stake in the Sudan's contested oil fields (Laufman 2010:16-17). It is clear that China, although helpful in some instances such as building of needed infrastructure in Africa (Brautigam 2009), in the case of Sudan, China simply sided with the winning party (government-backed militia) to loot oil resources, at the exclusion of the interests of local people (Laufman 2010). One therefore remains with one question; if Sudan did not have minerals, such as oil, was China going to risk and "invest" in Sudan in the midst of a conflict?

China's EXIM Bank has been active in DRC in terms of advancing loans for the extractive industries, in return for infrastructural development in water, electricity, education, health and transportation (Laufman 2010:18; Brautigam 2009:105-). In Angola, and in many other African countries, the Chinese businesses hardly benefit local businesses because when such loans are advanced to African governments, such loans are used to buy goods and services from Chinese companies. Quite often, competitive bidding is discouraged, and the Chinese are notorious for hiding crucial data such as projects costs, loan terms and repayment aid. Chinese companies are also notorious for hiring their own workers both in managerial and unskilled labour force (Brautigam 2009:134; Sanusi 2013), while the Chinese nationals often have their own different schools and houses, leading to accusations of separate development (Laufman 2010:20-21). However, Brautigam is at pains to argue that the view that Chinese companies bring in their workers is not entirely true and that it differs from country to country and that it is expensive to bring in Chinese workers directly from China and that work permits have made bringing such Chinese workers difficult (Brautigam 2009:156-157; Brautigam 2010; Brautigam 2011:6).

The then Nigerian Central Bank governor, Lamido Sanusi, was once quoted lambasting China for exporting unemployment to Africa, and that China was a significant contributor to de-industrialisation and de-development of Africa. Africa's trade with China is the "essence of colonialism": thus, he warned that Africa appears to be willingly opening itself to a new form of imperialism (Sanusi 2013; Igbino 2016:47). Additionally, it is widely accepted that China, through its state-owned companies in Africa, extracts and exports raw materials, while importing goods at a heavier cost and that China has flooded African markets with cheap goods, thereby threatening African businesses (Brautigam 2010; Sanusi 2013). Sanusi, (2013) wrote, "so China takes our primary goods and sells us manufactured ones. This was also the essence of colonialism". While low prices benefit poor African consumers, African workers and businesses are hard-hit by the presence of Chinese in Africa, especially bearing in mind that Chinese companies' "deals" (just like western companies), contracts and "investments" are often characterised by secrecy and limited disclosure of information (Brautigam 2009:310-311; Igbino 2016). In Nigeria, some textile

industries closed because of the flooding of cheap Chinese goods (Adisu, Sharkey and Okoroafo 2010:5).

This shows that these so-called “investors” are indifferent to the plight of local people and local economies. In the case where locals are employed in countries such as in the Chinese copper run mining operation in Zambia, there were often numerous reports of ill-treatment of Black workers where they often work in unsafe and inhumane working conditions and the general flouting of domestic laws (underpaid black workers) (Laufman 2010:56; Warikandwa and Osode 2016). Such behaviour by the Chinese companies have led to xenophobic attitudes against Chinese nationals and in some countries such as Zambia and Namibia, there have been demonstrations against Chinese enterprises and nationals (Blair 2007; Laufman 2010:20-21; Warikandwa and Osode 2016).

It is interesting to note that Angola, after the civil war, ditched the International Monetary Fund (IMF) and opted for a loan from the Chinese EXIMBank where there were hardly any conditions attached (Laufman 2010:38). Therefore, the Chinese deals are likely to thrive where there is a great deal of corrupt and dodgy activities and it hardly incentivises or pressures African countries to be accountable and transparent because Chinese companies appear to be solely geared towards extracting resources. Decrying about the exploitative nature of China-Africa ties, the former Nigerian Reserve Bank Governor, Lamido Sanusi also wrote, “Africa must recognise that China-just like US, Russia, Britain, Brazil and the rest- is in Africa not for African interests but its own” (Sanusi 2013). However, there is some evidence that China is coming up with some reforms to protect its reputation through enacting labour laws in China, as well as providing guidelines for Chinese overseas companies (banks and forestry companies) regarding corporate social responsibility and environmental protection (Brautigam 2009:309-310). The next section discusses land grabbing that is motivated by the desire to extract resources and growing crops by the so-called “investors”.

Mining and Land Grabbing (Robbing) in Africa

According to a report by the Gaia Foundation, titled *Opening Pandora's Box* that was written in 2012, there has been a huge demand for raw materials because of the increasing prices of oil and metals. This led to land grabbing in Africa, which threatened farming and water supplies (Sibaud 2012). Such moves towards land grabbing have been described as a force related to globalisation and neo-liberalism through free trade and privatisation (Warikandwa, Nhemachena and Mtapuri 2017). Foreign multinational corporations, governments, and even American universities disguised as “investors” are increasingly grabbing indigenous lands to extract minerals, grow crops, biofuels

thereby forcing indigenous people off their lands that they had been traditionally depending on for farming, leading to poverty and food insecurity (Nhemachena, Warikandwa and Mtapuri 2017). By 2011, The Guardian reported that American universities were using their endowment and pension funds in collusion with British hedge funds and European financial speculators to buy vast African farmland in “deals”, some of which may lead to evictions of local communities and such “investors” are notorious for overstating the planned benefits to local communities (Vidal and Provost 2011). There is evidence that in Tanzania and Ethiopia such “land deals” have led to the forced removals of local people who had been living in their area for a long time (Vidal and Provost 2011).

Research by Inclusive Development International, (2017:5) shows that International Finance Corporations (IFC) such as the World Bank have been labelled as the main culprits in aiding such land grabbing by international “investors” and corporations, at the expense of local communities, environment and farm groups. Such land grabs are a reversal of the gains of independence in Africa because when liberation movements fought against White settler regimes, their main focus was to get back their land that was stolen from them after the arrival of White settlers (Mtapuri and Nhemachena 2017). However, the land that was won by liberation movements is being cheaply sold to so called “investors” who trick African governments through sophisticated means. These land grabs are an attempt by outside countries to avert any future shortages in food, energy, biofuels and minerals, as well as the desire to make more profits for themselves. The impact of land grabs on African host communities often includes the following: violation of human rights (especially ill-treatment of women), malnutrition and food insecurity, the lack of respect for the principle of fair, free and prior informed consent of the community members. They also include disregard of the social, political and economic impacts, lack of clear, transparent contracts and binding commitments towards local development, impoverishment of local communities, as well as lack of democratic planning, independent oversight and meaningful community participation (APRODEV 2013:1). Thus, Nhemachena, Warikandwa and Mtapuri (2017) convincingly argue that the new wave of land grabs in Africa are a “(de-militarised) new scramble for Africa” disguised in terms of bringing FDI in Africa. It is a recolonisation of Africa by the transnational companies and foreign governments. The extractive industry is also replete with kickbacks (bribes) and the worsening of corruption in Africa.

Minerals Industry and Corruption in Africa

The race to extract minerals in Africa has no doubt been prone to different forms of corruption. African local traditional leaders, local and political elites

are often easily corrupted. Multinational companies, in the extractive industry, have paid massive bribes to corrupt government officials across Africa. In fact, some of these multinational companies, in extractive industry, are complicit in corruption, so much that bribes money can be set aside in slush funds, as a risk for doing business. In some cases, the multinationals can donate massive amounts to a ruling party with the intention of capturing the state, thereby gaining enough influence in shaping institutions, policies, laws and regulations of the state to their favour (Standing 2007:6-7). Whether local elites solicit bribes, or companies offer bribes does not matter, but what is clear is that, both local elites and companies are often complicit in corruption (Warikandwa and Osode 2017). Therefore, Chikwanha, (2016:1) correctly notes that corruption in the extractive industry has a clear supply side (extractive companies), and an equally clear demand side (bureaucrats, political elites, traditional leaders). African elites find it easier to accept bribes/kickbacks because they need money to consolidate power and maintain their patronage systems (Bryan and Hofmann 2007:14).

Therefore, the most notorious form of corruption on extraction of minerals in Africa involves local elites such as government officials, traditional leaders and their cronies who hold the keys to licencing and assist multinationals in giving license/permits to extract minerals, asking for kickbacks/bribes in exchange for licenses. In Nigeria, it is estimated that government officials have stolen at least 50 billion American dollars from oil revenues since 1960s (Standing 2007:4). In Angola, it is reported that many political elites are rumoured to be having massive personal wealth because of corruption, including the former president Dos Santos's family whose daughter is worth billions (Standing 2007:4).

In Sierra Leone, many locals have complained that the inflows of FDI, although they may be promising has led to complaints about working conditions in the foreign companies, lack of participation for communities the mismanagement and corruption in land "deals" for such companies, negative effects in health and other downsides (Menzel 2015:9-10). The Sierra Leone based multinational companies have been accused of corrupt "deals" because of evidence of collusion with traditional leaders and government officials to operate with impunity and evade the justice system for their crimes. For instance, in a radio interview, the paramount chief of Ko-idu openly said that he had received an envelope (bribe) from Koidu Holdings OCTEA and that the Vice President had received bribes quite often as well. This therefore, means that traditional leaders and the government officials are in the "pockets" of or captured by the multinationals, which means that they end up not serving the interests of Sierra Leoneans. Most importantly, there are allegations that when local workers complain, the employers of Koidu Holdings often respond in a

racist manner and tell workers that the government and traditional leaders are in their “pockets” (Menzel 2015:15-16).

Unfortunately, in African countries where political elites have amassed massive wealth through corruption, it becomes very difficult, hopeless and life threatening to investigate and prosecute the corrupt, especially in cases where there is lack of media and civil society freedom and where corruption has reached the judiciary, the police and civil society (Standing 2007:15).

A High Level Panel on Illicit Financial flows chaired by former South African President Thabo Mbeki, in 2014, noted that some multinational companies in the extractive industry are linked to illicit flows. Illicit flows entail illegally earning and transferring money outside a certain country, a move that is detrimental to the development of that specific country through loss of potential tax revenue. The irony is that over the last 50 years or so, Africa has lost about 1 trillion dollars through illicit financial flows, a sum that is roughly equivalent to the amount of financial aid that Africa has received during the same time frame. By 2014, Africa was estimated to be losing about 50 billion dollars annually through sophisticated illicit flow activities by multinational companies (AU/UN Economic Commission for Africa, Conference of Ministers of Finance, Planning and Economic Development 2014:13, 23-42).

Evidence shows that multinationals have economic power, while government bureaucrats, political elites and traditional leaders have access to power that multinationals need. The next section discusses how some multinationals often manipulate or corrupt traditional leaders, government bureaucrats and political elites to gain access to looting and theft of minerals.

Mining and Land Grabs: The Role of Traditional Leaders and Governments

Research shows that “investors” are often indifferent to the misery of local people, and that “investors” often collude with traditional leaders and some government officials to deceive and rob people of their lands and resources. The extent of collusion and deceit is so strong, so much so that, in most cases, by the time a multinational wants to evict a certain community, the state will often side with the multinational company, while the community resistance to eviction is often described as regressive. This is because traditional leaders have given themselves the “power” to (secretly) act on behalf of communities, while the governments in Africa often have the sole legal authority to sign off contracts and transactions without fully consulting or asking for consent of local people (Cotula 2011:17). Additionally, in most African countries, with the exception of Botswana, rural communities are seen as the occupants and not necessarily owners of their lands per se (Wily, 2012:764), and thus most land

grabbers usually use these weak customary laws to dispossess Africans of their lands. In South Africa, the government has been accused of aiding chiefs to help companies grab land in rural (communal areas) areas, at the exclusion of local communities and environmental activists. Traditional leaders are notorious for being complicit and corrupted by the so-called mining “investors”, leading to land grabs because traditional leaders mistakenly assume that they are the owners of land. Mining companies often find it convenient to pay one person (traditional leader), than paying thousands of communal members and therefore traditional leaders often act on behalf of communities, including signing agreements (Standing 2007; Menzel 2015; Duda 2017).

The South African government, which is seen as sympathetic to mining companies (as an attempt to lure “investors”), has also tried to empower traditional leaders (possibly as a vote buying mechanism), which leaves communities subject to evictions and rightlessness (Duda 2017; Hay 2018). In South Africa, by 2007, there were reports that Anglo Platinum was bribing local structures to get favours in spite of protests by local communities against the company for what protestors called unjust relocations, poor housing and inadequate compensation, yet the company was earning about 1 billion dollars per annum from that mine alone. In Nigeria, Shell was accused of bribing local traditional leaders in order to gain consent to mine on their lands (Standing 2007:13). In Angola, traditional leaders are reported to be acting as gatekeepers and dealmakers in granting prospecting rights and mining permits (Hall 2011:198).

Additionally, the United Nations Economic Commission for Africa has reported that contracts between mining giants and governments are often done in secret with confidentiality clauses that prevent the communities (rightful owners of mineral wealth) from seeing how the revenue flows and what rights and privileges they have as community members (Economic Commission for Africa 2009:4). In Sierra Leone, some locals feel that the promises that were made to them by the iron ore mining companies, the government and traditional leaders were not fulfilled, leading to feelings of being excluded and cheated on the part of locals who were asked to pave way for iron ore mining companies. There is also some evidence that some Sierra-Leonean local chiefs (Malen chieftdom) leased out land to foreign farming and mining companies without sufficiently consulting community members or translating land deals in local languages (Menzel 2015:7-8; 10-11). Additionally, after conducting research in Cameron, Ethiopia, Liberia, Madagascar, Mali, Senegal and Sudan, Cotula, (2011) concluded that local communities are often excluded, rarely consulted or informed before land dispossession.

As shown in the next section, evicted community members also suffer the terrible environmental damage caused by mining corporations and evidence

shows that in spite of their promises and profits, there is not much investment in environmental protection by the mining giants.

Mining and Environmental Damage

In Africa, Latin America and Asia, the profit-driven industrial mining activities have destroyed the environment, such as rivers and aquifers, leading to the poisoning of water systems, deforestation and the contamination of topsoil (Sibaud 2012). In Guinea, the waste from the gold mining activities by the Anglo Gold Ashanti mining company has flowed into river systems, thereby creating terrible environmental problems, including killing of fish, livestock and poisoning of drinking water (Inclusive Development International 2017:7). In Tanzania, in spite of the safety measures to manage toxic and poisonous industrial waste, the increasing gold activities have led to land degradation because safety precautions are sometimes violated. Rivers, domestic animals and people around mining communities have reportedly died from poisonous water body systems. In some cases, some communities have been forced to leave their lands because of land degradation and poisoning of their lands (Lugoe 2011:2). This shows the disregard for the lives of community members and the avid love for profits by these companies, at the expense of suffering of locals.

In countries such as DRC, Gabon, and Sierra Leone, the Chinese companies have been notorious for plundering resources without regard for the environmental regulations and African governments seem to be lacking spine in enforcing their regulations (Laufman 2010: 43-44). In Nigeria, the Ogoni community in the Niger Delta people have been angrily fighting to expel oil mining companies such as Shell Oil since the early 1990s because of the devastating impact of oil mining on their ancestral lands. Oil spills have forced people to leave their traditional ways of farming and fishing while oil killed and suffocated plants and animals, and gas mining has contributed to acid rain, desertification global warming and the drying up of rivers (Sibaud 2012:20).

The main reason why these multinationals have managed to evade justice and pollute the environment with impunity is corruption. There is evidence that in some cases, multinationals bribe political elites to evade the environmental laws of certain countries. For instance, by 2007, there were reports that the Zambian copper mining companies struck a deal with the state, which meant that some of those mining companies were exempted from being prosecuted from environmental degradation (Anon cited in Standing 2007:10). The mining industry in Africa is also notorious for human rights abuses such as rape, murder, torture, arbitrary arrests and forced removals of local community members as discussed in the following section.

Mining, Human Rights and Forced Removals of People

Research shows that mining, which often happens in rural/communal areas has created massive conflicts between local communities on one hand versus the governments, the so called “investors” and traditional leaders on the other hand. Studies show that the rights of local communities who are the rightful owners of the wealth (minerals) is increasingly ignored to pave way for mining corporations who often grab land and water resources. In South Africa, the Gupta-owned Tegeta mining company has been embroiled in scandals of non-compliance to mining laws, posing risks to many lives around the area and yet the owners of the mining company pocketed huge sums of money (Njobeni 2018). In Zimbabwe, the entrance of Chinese “investors” due to the discovery of diamonds in 2006 has made the lives of local people worse than before and Chinese companies have been embroiled in human rights abuses and accusations of failing to honour their promises to local people. Although the government has tried to romanticise the impact of Chinese “investments”, evidence shows that local people have been dispossessed from their ancestors’ land, with questionable compensation, thereby losing their livelihoods and due to the deteriorating economy, community members became destitute and yet these companies continue to loot diamonds (Alao 2014; Chenjerai 2017). By 2017, over a decade later, local communities in Mutare have lost livestock because of poisonous water, pregnant women have given birth to children with disabilities, while others suffered miscarriages, the water in rivers also causes skins to itch, the environment has been badly polluted and people and animals have died after falling into unsecure pits (Chenjerai 2017). Additionally, in South Africa, the killing, by the South African police, of over 34 striking poor mine workers from Lonmin mine in Marikana in 2012 shows the lethal nature of the collusion of the state and capitalists to exploit Black workers. By 2018, virtually 6 years after the Marikana massacre, the families of the killed Marikana workers were still waiting for justice and compensation (Essa, 2018).

Land grabbing for development projects such as mining, infrastructure projects, food exports and biofuels production are notorious for the forced removals of communities and the co-option and bribery of traditional leaders and government officials. This has been done to pave way for “development” projects, such as infrastructure, food exports, hydro-power plants and biofuel production or for extraction of natural resources, leading to landlessness, hopelessness and hunger of communities (Sibaud 2012; Siciliano 2013 cited in Mtapuri and Nhemachena 2017). In Tanzania, forced removals to pave way for such developmental projects were related to the emotional pain of losing one’s ancestral land (Lugoe 2011). Therefore, land grabs are also a violation of cultural beliefs because according to African cultures, the ancestors need to be honoured

(Mwandayi 2011; Ikechukwu 2017). Thus, families need to be closer to their ancestors' graves to look after them and for rituals purposes (Ibid).

In theory, mining should or is said to bring about jobs, poverty reduction, food security and local economic development, but the presence and discovery of minerals in any rural community is often the beginning of anxiety, misery, fear, killings, starvations and rapping of women in many communities in Africa. In some parts of Africa, such as Guinea, Angola, Malawi, Zambia and Zimbabwe, the state often deploys the army to clear the area for mining activities, which often involves gunshots, raping and killing of villagers (Global Witness 2010; Chanda 2010 cited in Hall 2011:198; Inclusive Development International 2017:4). In Zimbabwe, when diamonds were discovered in Marange, a lot of Zimbabweans went to dig for diamonds, and the Zimbabwean government responded by sending armed forces, leaving hundreds of people dead. A lot of human rights abuses were linked to Robert Mugabe's ruling party (ZANU PF) that had dodgy joint ventures with some foreign companies (Global Witness 2010).

The Chinese's unconditional "investments" in oil rich areas such as Cabinda in Angola have been related to the worsening of human rights abuses such as torture and arbitrary arrests by the state to protect the interests of Chinese companies (Laufman 2010:64-65). In Guinea, with the presence of soldiers, "deals" and signing of documents with community members were often done at gunpoint (Inclusive Development International 2017:4). DRC has become the rape capital because of the massive sexual violence against women and children due to the conflicts that are related to the exploitation of natural resources (Laufman 2010:84). There are numerous examples of village communities in Africa who want to grow food in their ancestral lands but have been expelled, criminalised and in some cases killed to pave way for a multinational mining giant to make wealth through mining of minerals and farming (Sibaud 2012). Forced removals in Sierra Leone to pave way for mining companies have worsened the breakup of families as some women left their husbands after losing their fields (which is their source of livelihood) to grow crops (Menzel 2015:14).

In other African countries such as DRC, Liberia, Sierra Leone, Angola and others, diamonds have funded civil wars wherein land-based livelihoods have been destroyed, people have been killed, raped and economies wrecked, thereby producing what has been termed "blood diamonds" or "conflict diamonds" (Global Witness 2006; Smillie 2013). There is no doubt that foreign multinational companies and governments have been complicit in these horrific civil wars to loot and profit from such natural resources, leaving local communities in dire poverty.

In South Africa, some communities have realised the avaricious nature of mining multinationals, and communities have resisted these mining activities. This often leads to violent clashes between communities and the police to resist evictions upon realisation that local elites or traditional leaders would have made secret deals/signing of documents with mining companies (Dolo 2010 cited in Hall 2011:198). Local communities in some parts of Tanzania have also resisted mining companies (Lugoe 2011:3), while in Sierra Leone, it is reported that the government often describes protests against farming and mining companies as acts of “petty crime” and “sabotage” and that local communities are not educated and patriotic enough to understand the benefits of FDI (Menzel 2015). In one instance, when workers protested against the ill-treatment by the multinational company (Koidu Holdings), the Sierra Leone Vice President (who was fingered in corrupt acceptance of bribes from Koidu Holdings) went to address workers. He was so angry with the workers that he ordered them to sit down on the ground, while siding with the multinational companies, as well as describing the workers as “riotous troublemakers” (Menzel 2015:16).

Displacement of communities by the so-called “investors” have also happened in Ethiopia, Gabon, Sierra Leone and Zambia (Inclusive Development International 2017:9). In Sudan, when the local communities resisted forced removals to pave way for a Chinese power plant, they were reportedly harassed and killed by the state militia (Laufman 2010:50-51). In South Africa, the Xolobeni community in Eastern Cape has been fighting against an Australian mining company since the early 2000s because of fears of losing their livelihoods (agriculture and fishing) and their ancestral lands if the mining company is granted a mining permit to mine titanium. The irony is that while this Australian company, Minerals Commodities Resources (MCR) is fighting to get a mining licence in the Eastern Cape, it left some terrible environmental damage in the Western Cape. Through its subsidiary Mineral Sands Resources (MSR), the company failed to fulfil its promises, while also breaching the terms of its own mining licence, despite making massive profits (Pather 2018).

Land grabs (robbery) are therefore a dehumanisation process that not only destroys community livelihood sources, but also relegate local communities to the status of landless citizens who must submit to the dictates of their neo-colonial masters who come in the pretext of “investments”. This is because African communities are stripped off their heritages, their self-worth, self-esteem, individual sovereignty and the sovereignty of African states (Mtapuri and Nhemachena 2017). The next section shows that evicted communities have been left in dire poverty after evictions by multinationals and that in spite of making massive wealth, many multinationals have not fulfilled their promises to local communities.

Hunger and Impoverishment Persists Despite the So Called “Investments”

Most of the rural communities that are often manipulated and forced off their lands, have nothing much to hold on to and are often living in poverty. In Guinea, the Inclusive Development International (2017:5-6) recorded that community members (rightful owners of land) who were forcibly removed by the army at gunpoint, to pave way for the Société Anglo Gold Ashanti de Guinée (SAG) were worse off than before and severely impoverished and yet the mining companies created extra-ordinary wealth. Research in Tanzania, suggests that gold mining companies have neglected local communities, which shows that large firms have little interest in developing and uplifting communities, but rather the generated wealth is used in operations, management and financing of these companies (Lugoe 2011:2). In Sierra Leone, the compensation and surface rent payments for land lease agreement do not make up for the resources and livelihood opportunities that have been lost for local communities and benefits are often controlled by senior family men, at the exclusion of women and other junior males. With limited direct access to land, many women are forced to buy foodstuffs that they used to grow: this has ruined their livelihoods, leading to the dropping out of school children (Menzel 2015:12-13). Similarly, in Mozambique, the evicted peasant community members due to the so called “investments” and land “deals” could not get employment in cities because of low industrialisation levels, leading to high unemployment levels (Tanner 2010:125 cited in Mtapuri and Nhemachena 2017). It is important to state that where investments have led to economic gains, such economic gains do not always lead to economic development for local people. In Sierra Leone, the Human Rights Watch, (2014) has noted that increasing “investments” in extractive industry risk perpetuating a “resource curse”, wherein minerals and oil wealth fuel human rights abuse, rather than lasting benefits for local communities.

Conclusion

While this chapter does not claim that the misery and underdevelopment in Africa is solely caused by multinationals, it stresses that the large multinationals offer the demand side of looting, while African elites offer the supply side. These two groups help each other to steal and loot African resources, at the expense of poor African communities and the environment. While western liberals characterise the mining activities in Africa, by large corporations and international businesses, as “investments”, the corporations are in fact looting and stealing resources from Africans. While there is some peace-meal benefits,

from mining, such as employment, local development, increase in revenue through tax and other benefits, the characterisation of Chinese and western corporations as “investors” is misleading. Extensive research has shown how these so-called “investors” loot and profit from resource extraction in Africa through uncouth means, at the expense/exclusion of local communities. Evidence shows that, in spite of the massive amount of profits that the multinationals make, they often fail to fulfil their promises towards local communities and that most communities who have been evicted to pave way for mining are worse off than before. African elites and politicians help these multinationals to get away with such stealing and looting of resources. The recent increase of the presence of Chinese in Africa, through aid, trade and “investments” has not helped to end the essence of colonialism and exploitation of Africans under the pretext of FDI in mining and to contribute towards meaningful local development in Africa. The Chinese companies are disguised as “investors” and they collude with some African leaders. On the other side, the African rogue leaders have found Chinese “investments” more appealing because Chinese “investors” do not require much scrutiny, accountability and transparency. The poor local people become the worst victims of evictions, poverty, lack of employment, poisoning of their environments, and loss of livelihoods, racist and ill-treatment of local employees (Menzel 2015; Inclusive Development International 2017). Thus, there have been some xenophobic feelings and resistance against Chinese nationals operating in Africa. Evidence shows that while there are a few benefits brought by these “investors”, many poor African communities feel that they have not benefitted much from Chinese presence.

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Chinese Companies and their “Investments” in Africa: A Critique of the Viability of China’s Corporate Social Responsibility Approach in Zimbabwe’s Mining Sector

Tembo Moment

Introduction

The Chinese “investment” in Africa has significantly grown in the past decades. The growth of Chinese “investment” is evident in infrastructure development, loans and most importantly in mining. The Chinese growing industry have a large appetite for raw materials, as such, the Chinese began to make headways into the mining sectors of many African states. In Zimbabwe, the Chinese are actively mining various minerals. This chapter critiques the Chinese “investment” in mining and how their “investment” effectively addresses the concept of Corporate Social Responsibility (CSR) in mining. Pertinent to the discussion is the approach of the Chinese mining corporations to the environment, social and economic responsibilities within the areas adjacent to their mining activities. Mining can be highly destructive when mining companies do not account for their activities. However, if CSR is effectively adopted by corporations, development initiatives are carried out as such, mining plays its role in reducing poverty in Africa which is an essential sustainable development goal (SDG). The chapter found out that the Chinese are not complying with CSR principles in the mining sectors of Africa. Chinese corporations’ disregard of environmental and labour practices are not in line with the principles of CSR. It is argued that, like the colonial settlers, the Chinese do not practise responsible mining. In such a scenario, communities are disempowered and development becomes elusive.

There is an existing and ongoing debate on the benefits or lack of ‘investments’ in Africa. The concepts of ‘underdevelopment of Africa’, ‘imperialism’, ‘resource curse’ and ‘white monopoly capital’ emanated from such a debate (Wiig and Kolstad 2010: 180; Murombo 2013:45). On one hand, the term “investments” is argued to be deceptive, serving the interests of Euro-America and recently the politically connected East led by the Chinese. They engage in resource plunder without actually promoting investment in socio-economic transformation (Ofodile 2017). On the other hand, socio-political and economic transformation of Africa are arguably highly dependent on the

relationship and position of Africa in the global political economy. The decolonisation of Africa squarely rests on the political and most importantly the economic independence of African countries. In Zimbabwe, the Look East Policy where the Chinese “investments” were given preference over the West, witnessed an increase in the Chinese ‘investment’ in the country’s different sectors including the mining sector. The mining sector is expected to become a key contributor to sustainable development (Lockett, Moon & Visser 2006:115; Hodge, 2014:6). However, the Chinese “investments” in Africa have been criticised on both social-economic and environment fronts (Krukowska 2016:167; Xiaohong *et al.* 2009:21). According to Ofodile (2013:147) the “investments” are reflecting the interests of the Chinese more than they are a benefit to the Africans. This chapter provides a critique on the Chinese “investments” in Africa, particularly, in the mining sector of Zimbabwe and the viability of their corporate social responsibility approach to local communities.

Corporate Social Responsibility as a Concept for Development

The concept of corporate social responsibility (CSR) denotes the approach to business where corporations are expected either by law or outside law to not only make profit and create value for themselves (Carroll 2016; Hamidu, Haron & Amron 2015). Instead, companies should adopt internal policies which, on one hand, manage the impact of their activities and on the other provide necessary “investments” for socio-economic development (Zhang, Ma & Morse 2018: 3). As such, according to the principles of CSR, business has an obligation to society, economically and socially. The European Union defines CSR as “the responsibilities of enterprises for their negative impact on society, achieved by being compliant to the law and integrating social, environmental, ethical, consumer and human rights concerns into their business strategy and operations” (European Commission 2011: 3). In accordance with the above definition, corporations have responsibilities for those aspects of society that are negatively impacted upon by their day-to-day activities. It becomes incumbent upon the corporations to include CSR strategies and the implementation of these strategies in a way that would minimise or eliminate the negative impact of their operations.

While the EU defines CSR in terms of correcting the negative impacts of business, the World Business Council on Sustainable Development (WBCSD), on the other hand, focuses more on CSR which commits to and promotes sustainable economic development. The WBCSD defines CSR as “the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life” (WBCSD 2000:45). In terms of this definition,

businesses, mining included, are therefore obliged to contribute, through their CSR policies and practices, to sustainable economic development for the local communities in which business is taking place.

A context and background of poverty and underdevelopment in Africa as a result of structural socio-economic discrimination policies by the former colonisers has put poverty alleviation on the agendas of “investment” policies of African countries. As such, central to CSR is the understanding that business, government and society become institutions which develop interactions tailored to fulfil the poverty alleviation agenda and socio-economic expectations from within society (Tan-Mullins & Hoffman 2014: 3). CSR in the mining sector is no exception to these classical economic struggles and development oriented expectations on “investments” by stakeholders especially the local communities. Foreign Direct Investments (FDI) in Africa and Zimbabwe are therefore, expected to also provide sustainable benefits to the hosting society.

The existence of different minerals makes Africa and Zimbabwe in particular favourable destinations for Chinese “investments”. The Zimbabwean government, like many in Africa, received several “investments” from the Chinese. For instance, an investigation by Busse, Erdogan and Muhlen (2016:19) found out that there is a growth in Chinese FDI in Africa over the past decades. In Zimbabwe, the Chinese “investments” increased from USD52.2 million in 1996 to USD1.1 billion in 2013 (Chun, 2014:15). What is highly significant is that Busse, Erdogan and Muhlen (2016:19) also found out that the FDI from the Chinese is not translating into economic development. According to Mapaure (2014:3), scholars, economic analysts and governments have raised questions, both valid and in some instances controversial, about the implications of such Chinese “investments” on the African society. Some scholars regard the China-Africa relationship as a mere avenue, for the Chinese, to exploit African natural resources (Chun 2014:3). The legitimacy of Chinese “investments” is put into question in Zimbabwe, a former colony of the Britain, where the narrative and expectation is for the decolonisation of previous historical socio-economic relations. It is imperative to suggest that many conflicts within the continent of Africa, both historic and contemporary, are attributed mainly to the struggle for controlling mineral resources (Bassey 2018:7).

Some CSR initiatives such as the African Mining Vision (AMV) have been crafted to tackle the disparity between “investment” in mining and its translations to economic value. The background of AMV reminds scholarship of the conflicts diamonds in Sierra Leon, in Darfur and the militarisation of Marange Diamonds in Zimbabwe. This evidently provide an insight on how mineral resource extraction takes place without contributing to economic development. According to Cronje *et al* (2014), the AMV provides an

alternatives path to the status quo. It ensures that nations are able to negotiate better mining contracts with “investors” and ensure that “investment” in mining assists in local development and protection of the environment. This alternative route to African mining, minimises the plunder of mineral resources in Africa.

In the pre-colonial period, mining in Africa was given credit for the rise of powerful states such as Mutapa State, Rozvi and the Mapungubwe, among others, which amassed wealth through the mining of gold and other minerals such as iron. It is not surprising that the contemporary African nations expect more from mineral exploitation. Traditionally, mining exploration has played a significant role in alleviating poverty in Africa, however, this is hardly the case today. Although scholars such as Chun (2014), view Chinese-Zimbabwean relationship as an ideal model to follow, this chapter argues that the existential parameters of this relationship are coded on party to party basis with no exclusive intentions of providing equity and or benefits to the bottom line which CSR obligates to business. The CSR obligations, as stated before, include but are not limited to community benefit, sustainable economic development, ethical environmental practice, law and human rights, and transparency and accountability. It is essential to provide a detailed prognosis and analysis on the outlook of the Chinese FDI in the mining sector of Zimbabwe. The following section focuses on the roots of the problem with reference to FDI in mining in relation to the economic, social, human rights and environmental implications of Chinese “investment” in the mining sector of Zimbabwe.

Economic Issues

African countries, Zimbabwe included, are regarded as developing and experiencing challenges including poor economic incentives, substantial balance of payments deficit, high unemployment rate, low economic growth and poor infrastructure (Mupfawi & Tambudzai 2015: 2). According to Munyanyi (2017:1), foreign “investments” provide the much needed forex which stimulates the mainstream economy that can be sustained through exporting products. Forex obtained through exports create a favourable balance of payment (B.O.P). In Zimbabwe, the mining sector is second to tourism as the largest forex earner. The biggest question is how to separate “investments” for production in the form of capital and “investments” for economic development. This chapter argues that despite the Chinese injecting capital into the mining sector of Zimbabwe, there is less activity on “investment” for economic development after profits. In as much as the corporations in the mining sector are also expected to pay tax and royalties to the tax collector and that the National Economic Empowerment Act of 2012, enforces that corporations in the mining sector must “invest” beyond satisfying balance of

payments or mere capital injection. In essence, mining corporations must contribute to the community development initiatives called the Community Share Ownership Trust (CSOTs) (Dube 2013:9). The concept of CSR resonates well with this law as mining “investments” must benefit all stakeholders involved. The funding towards the CSOTs can be used to provide social infrastructure for adjacent communities and other related community development programs. The funds can also be used to mitigate the negative impacts on the environment as mining is regarded a highly destructive activity. However, this is not the case as predominantly the Chinese foreign “investors” have repatriated the majority of the resources generated with little or no beneficiation accruing to African indigenes as it is supposed to be. For instance, at Arda-Transau, a resettlement area established by Mbada Diamonds paving way for mining in Marange lacked adequate infrastructure such as clinics, dip tanks, secondary schools and safe drinking water years after commencement of mining production (ZELA 2016; Murombo 2013:38). Scholars now fear economic subjugation by a new global player in the name of the China (Johnston and Yuan 2014:6).

In Zimbabwe, as in the case of Angola, bilateral “investment” treaties (BITs) were signed. Loans are argued by Haroz (2011:73) to be beneficial to Africa in the short run in terms of infrastructure development and FDI. In the mining sector, there is a growing narrative that the Chinese have over the years offered loans in exchange for mineral resources. To add, since there are so many risks of default in Africa due to unforeseen market price shocks and volatility, natural disasters and droughts, the terms for such loans are burdensome and tantamount to mortgaging African natural resources (Ofodile 2013). Such terms reflect a huge influence of the Chinese in Africa where the expected trickle-down effect does not materialise. Thus, it has been argued that the Chinese are simply perpetuating the colonial style exploitation of African resources (Johnston & Yuan 2014:10).

There is also a major concern of illicit financial flows (IFF) mainly from the mining sector of African countries including in Zimbabwe. A paper published by the Zimbabwe Lawyers for Environmental Law and Zimbabwe Coalition for Debt and Development on illicit financial flows (IFF) in the mining sector insinuated that IFF in Africa is almost equal to its GDP: for Zimbabwe it is estimated at about USD600 million annually (ZELA & ZMCODD, 2018:2). Of the 600 million, 98 percent according to The African Forum and Network on Debt and Development (AFRODAD) is argued to be leaking from the mining sector. In March 2018, the government of Zimbabwe released a list of corporations which had illicitly transferred large sums of money out of Zimbabwe. On the list, the top five companies were from the mining sector and three were of Chinese origin with a combined amount of externalised funds of

approximately USD90 million (ZELA & ZMCODD 2018). One is bound to argue that because these are illicit financial flows based on estimates, there is more that Africa is losing. To add on the argument by ZELA & ZIMCORD (2018) that funds earned from the Chinese corporations are finding their way outside Zimbabwe, this chapter also argues that mining communities are experiencing little development and no benefit from the Chinese “investments”. According to the Human Rights Watch (2009) report on Chiadzwa, police and the army had their own syndicates which worked at the diamond fields in exchange for payments.

Social Issues

In mining policies, there are clauses on anti-corruption, money laundering, human rights, democracy and good governance. It is important to point out that not always are the conditions useful for Africans. However, unlike the West, the Chinese provide their “investment” without conditionalities. Western conditionalities were a prominent feature of the period of Economic Structural Adjustment Programmes (ESAP) in Africa. However, in Chinese “investments”, that do not have conditionalities, finances are not adequately accounted for and there is lack of transparency: the Chinese have the worst records on environmental protection and human rights in the countries where they invest (Buhmann 2017:136).

One of the main principle for corporate social responsibility is the mitigation of environmental impacts by the mining corporations. According to Kowalska (2014:128); Que, Owuah-Ofeh & Samaranayake (2015:489) and Ranangen (2013:1) mining is highly destructive and contributes to air pollution through dust from tailings which may contain elements such as sulphur, helium, iron, and uranium. Mining also contributes to land pollution such as open-cast mining which causes craters, hollows, cracks and bars which deforms the area, coupled with noise pollution from drilling and blasting. As such, in the extractive sector, stakeholders expect environmentally responsible “investment”. Instead of mining “investments” contributing to the development of adjacent communities, the Chinese disregard ethical environmental practices. Thus, the Odzi River, at Chiadzwa mine, in Marange is polluted due to tailings and other elements deposited into the river by mining corporations - including the Chinese mining companies (Parliament Portfolio Committee 2018). In a situation like this, communities are deprived of their health and clean drinking water which constitute targets in the Millennium Development Goals (MDG).

Central to CSR is the assertion that human rights are synonymous to human socio-economic development (Torrance 2015:10). As indicated above, for over

a decade, Chinese corporations have been accused of the worst record on environmental issues and human rights. For instance, Chinese firms are accused of buying mineral resources from areas of conflict. One assertion is that during the 2008 bloody cleansing of Marange Diamonds field by the army in Zimbabwe, the Chinese were the major “investors” in such a sector despite the Kimberley Process ban on diamonds from conflict areas (Matangi 2006:605; Southern Africa Resource Barometer 2013:1; Swatuk 2010: 532). Such bad records on environmental issues and human rights prompted the Chinese to set specific directives for overseas operations of Chinese mining-sector firms. CCCMC’s Guidelines for Social Responsibility in Outbound Mining “Investment” (CCCMC 2014) were followed in December 2015 by the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains (CCCMC 2015), which elaborated responsible mining (Buhmann, 2017:136). The model for Chinese CSR is aligned to the United Nations Declaration for Human Rights and International Labour Organisation (ILO) while also adhering to the UN Guidelines on Business and Human Rights. However, it is regrettable that there is evidence in Zimbabwe of Chinese mining corporations abusing employees through use of violence, working without pay, unhealthy occupational conditions (HRW 2009). Various human rights abuses often occur to those employed in the mining sector as well as to those who reside in the areas affected by mining activities (Saurombe 2014:7). In addition, the local inhabitants of Marange experienced theft and harassment by both illegal miners and government state security agents (HRW 2009). CSR principles such as the Bench Mark Principle for Corporate Social Responsibility promote the hiring of local employees. However, the Chinese bring their own expatriate workers in a move that does not allow community involvement and lateral economic benefits for the adjacent communities. Johnston and Yuan (2014:30) note the use of Chinese labourer in Chinese funded infrastructure projects in Africa.

A study carried out in 2010 by the NGO for Rights and Accountability in Development examining primarily remuneration, job security, freedom of association, health, safety, and social benefits concluded that the respondents had nothing positive to say pertaining to working conditions in Chinese corporations (Jansson 2010:2). Issues raised included physical abuse of workers by Chinese officials, non-payment of hospital bills by Chinese companies for occupational injuries and failure to pay outstanding salaries. The human rights abuses of employees by Chinese corporations are widespread in African countries. The Zambian Former President threatened to chase all the Chinese mining corporations, extracting copper in the Copper belt, due to some allegations of gross human rights abuses of workers and villagers (Lee 2014:33).

In Zimbabwe, there is no evidence of Chinese corporations committing gender abuses, however, within communities with such negative impacts of

“investments”, women bore the most brunt of effects. When families become landless due to mining-induced development resettlements (MIDR), women and children suffer more in an African set up (Owen & Kemp 2015:481). The contemporary literature on gender argues that there cannot be any talk currently for development when women are discriminated and excluded from development agendas. Chinese “investments” within communities evidently exclude all but mostly women and children suffer.

Any “investment” in mining is supposed to play a significant role in alleviating poverty in Africa. However, Chinese “investments” do not alleviate poverty. There is lack of transparency in Chinese “investments”. It is now public knowledge that Africans are becoming more and more knowledgeable of the need to realise economic development from the natural resources of the continent.

The CSR dimension in the extractive sector deals with issues of “investments” not just for profit making and satisfaction of the shareholders but also for the inclusion of adjacent communities into the mainstream value chain of resource production. This includes investing in community development and local agenda while mitigating environmental impacts and upholding human rights. Through the CCCMC’s Guidelines for Social Responsibility in Outbound Mining Investment of 2014 and the December 2015 Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains (CCCMC 2015), the Chinese are yielding to both international pressure to practice responsible mining in terms of CSR principles. However, Chinese “investments” in Zimbabwe evidently are not adhering even to the CCMC (Ofodile 2013:196).

Conclusion

The Chapter has provided a critique of the Chinese “investments” using a corporate social responsibility approach to community development in the extractive sector. In terms of CSR principles, “investments” in the mining sector should be seen to contribute to community development and environmental management. Among other issues, “investments” such as in the extractive sector, predominantly found in the rural areas, can also contribute to local employment, local community infrastructural development. The “investments” by the Chinese are under growing scrutiny in Africa.

The chapter argued that the Chinese “investments” are not translating into local development for most host African countries. Chinese “investments” have not contributed to basic infrastructural development and local employment. They have not contributed to CSOTs in Zimbabwe. In addition, socially, the Chinese are in major breach of labour laws with a massive prevalence of poor

labour conditions which among others include assault of workers, work without pay, and lack of medical support for the injured employees. Local communities are also affected by Chinese bad environmental management practices where water sources are polluted and there is land degradation. These aspects are central to CSR in the mining sector. As such, according to the CSR principles, the Chinese “investments” in Africa are still lacking when it comes to contributing to meaningful economic development. Notwithstanding the efforts by the Chinese authorities in coming up with CSR guidelines adapted to the international guidelines on CSR such as the UNGC, Chinese guidelines such as CCMC were created following an outcry. Secondly, there is no evidence that the CCMC are being adopted by the Chinese companies extracting minerals in Africa and particularly in Zimbabwe. There is therefore need to decolonise African economies so that indigenous people can have autonomy, independence and sovereignty over their natural resources.

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Multinational Pharmaceutical Companies (MPCs) and Mal-Drug Administration: Any Role for State Government in the Era of Globalisation in Africa?

Lere Amusan

Introduction

Multinational pharmaceutical companies (MPCs) dominate drug manufacturing and distribution at the global level. They look after the interests of their shareholders as against stakeholders'. Their claim is that they invested a fortune on research and development (R&D) and therefore argue that there is need to recoup their investment expenditures. These claims generate debates among non-governmental organisations (NGOs), students of development, health related international organisations, state government and private individuals. Corruption and propaganda together with the lobbying power of MPCs contribute to killing of the masses only to satisfy their shareholders' financial reward based on their monetary investments. It is the intention of this chapter to examine some killing drugs and illicit guinea pig experimentation on newly rolled out drugs: the experimentation is done on Africans. Prescription of different drugs to the same ailment, as was the case of HIV/AIDS between developed and developing states, is a case in point (Amusan 2015).

Like other multinational corporations (MNCs), the pharmaceutical corporations hardly observe the concept of corporate social responsibility (CSRs) for the host state to benefit from their activities (Amusan 2018; Dicken 2015). Rather, they only work towards satisfaction of their directors (Chang 2010). Many scholars (Amusan, 2018) are of the view that these companies are more powerful than their home and host states in term of achieving their objectives irrespective of the law of affected nation(s). Because they have enough funds at their disposal, they are always ready to part with millions of dollars for out of court settlement for whatever unethical adventure they embarked on (Mamu 2017). In Nigeria, because of Pfizer's misadventure in its drug test where 11 children died in 1996, the company, [after several denial about their Trovan drug trial test that needed prior informed consent (PIC) of the affected patients] agreed to pay \$75 million as out-of-court settlement (Pflanz 2009). Series of allegation of bribing of civil servants, members of legislature with particular reference to those in relevant committees that deal

with their activities and in some cases, regulatory agencies such as food and drug administration are always levelled against them.

As pointed out by Bond (2006), the activities of MNCs in looting African resources is unabated since the time of slave trading through to colonialism and neo-colonialism of the 21st century. Through cumbersome patenting system, many African plants and animals have been patented by MPCs. Piracy of indigenous knowledge (IK) by MNCs in general is well researched on by many students (Bond 2006; Carmody 2011; Drahos 2000; Onimode, 2000) of Third World and concluded that the genesis of African underdevelopment is traceable to the activities of MNCs in Africa. Indigenous knowledge system (IKS) and its associated criteria such as geographical indications (GIs), PIC and access and sharing benefits (ASB) are always ignored by MPCs because of imperatives of responsibility entrenched in them (Amusan 2014).

With sensitive information at the disposal of MPCs, these companies cannot claim that they do not know how some drugs are sold and to who. This brings out the selling of some illicit drugs to people knowing that a large percentage of consumers are consuming to make them high. Codeine for instance that is classified as over the counter (OTC) drugs is abused by youth in many parts of Africa. The rate of consumption of codeine (cough syrup) are not checked by manufacturers irrespective of the negative consequences on consumers. They, due to their superior advantage in R&D, always come up with further drugs to treat those that abuse its intake. What a continuation of business as usual by these MPCs?

Also worrisome is the unholy alliance between pharmacists and MPCs where selling of their products are promoted through series of incentives to those who should protect the lives of citizens. Very close to this is the power of advertisement of the multinationals and the roles of their sales representatives. Pfizer (USA), GlaxoSmithKline (GSK) (UK), Sanofi-Aventis (France) with their sales representatives are always on the neck of their retail outlet to make more sales for the end-of-the-year present that is mouth-watering (Ford 2013). The nature of their advertisement only tell the positive side of their drugs and silent on the side effects/contradictions such as damages to liver and causes of further illness. They rather advise patients to see their physicians in case of complication as against indicate the probable side effects. With questionable capacity training and workshop on new drugs in town usually organised by MPCs, both pharmacists and physicians are always encouraged to prescribe their new drugs to their patients, even when such drugs are ban in Europe and America because of their grievous side effects. An example of this is Trovan that was introduced in Kano, Nigeria where not less than eleven children died in 1996 (Pflanz 2009).

Employing secondary data and constructivist theoretical approaches, this chapter calls for corrupt free governments in Africa where bribery of civil

servants, NGOs and politicians will be totally discouraged so that monitoring of free flow of killing drugs in Africa will be minimal if not totally eradicated. Drug law enforcement agencies should be empowered and trained for close monitoring of MPCs, pharmacists and doctors' activities to avoid wrong and overdose prescriptions.

Theoretical Framework: Constructivism

Constructivism theory questions dominant theories in social sciences such as Marxism, realism and liberalism. This theory evolves in the post-Cold War international system and the dominant adherent of this is Wendt (1992). As captured by Cox (1991) and Kratochwil (2015), theory is for someone, for a purpose and environmentally determined. The theory emphasises social dimensions of interactions and the possibility of change. It is historical and culturally determined as against behaviourist empiricism rigidity; this implies that there is a need to believe in subjectivity. Hence, what is right and wrong varies from person to person and from society to society (Manbach & Rafferty 2008: 33). The theory contextualise two opposing views: foundationalists (those who believe that truth can be determined through empirical testing) and anti-foundationalists (this school is of the view that there are no neutral, value-free tests to determine the truth of a proposition). In line with Mansbach and Rafferty (2008: 34):

Constructivism emerged as an effort to narrow the gap between empiricists and postpositivists. Constructivists claimed that people act in the world in accordance with their perceptions of that world, and that the *real* or objective, world shapes those perceptions. These perceptions arise from people's identities shaped by experience and changing social norms. Once people know what they want, they can understand their interests and forge policies to pursue those interests.

Based on the issue of MPCs, their interest is to realise profit at all cost for their shareholders and directors of their company. They are not interested in the theories of liberalism, neo-liberalism and utilitarianism that call for maximisation of advantages of free market. Free market as discussed by students of liberalism, there is a need to encourage individualism and maximisation of profit based on competition and innovation. Because of superior technology, they are able to dominate market and did not encourage small and medium scale pharmaceutical companies to grow. This they did through various means such as dumping, aggressive marketing strategy and lobbying power among governments' officials as discussed above. Their monopolistic powers distort

market and always discourage generic drugs, only to effectively capture the market. They always ignore their acclaimed CSRs, most especially for life-threatening drugs. Instead of embarking on affordability principle in the developing states, they instead encourage NGOs donations, their products and developed states aid that amount to the Third World raid (Chikane 2013). As captured by Amusan (2015: 69), MPCs should embark on out-licensing in the form of: “Voluntary and involuntary licences in time of circumstances of national emergency; circumstances of extreme urgency; case of public non-commercial use ; and public health crises relating to AIDS/HIV, TB, malaria or other epidemics”.

Constructivism theory challenges the concept of individualism as uphold by rationalists and neo-realists. It is the intension of this chapter to call for a turnaround about the activities of the MPCs so as to benefit patients in Africa who are at the mercy of multinational corporations and their illicit drugs that is killing and deforming people with little solution from host states. This theory calls for a need to amend relevant international law that continue to support MPCs and their questionable R&D and welfare of the people of developing areas. It is the turn of this chapter to look into the activities of MPCs and global health challenges before focussing on Africa.

MPCs in Global Health Challenges

Contribution of MPCs in health care system is not a thing that one may overlook considering their efforts to eradicate some diseases that were previously considered as terminal ones. Through their acclaimed R&D, they were said to have eradicated many diseases at the global level ranging from previously deadly malaria, tuberculosis (TB) and Ebola. But it is known that universities and other organisations are the institutions that embark, mostly on research work that lead to new drugs development, but only licensed by MPCs (Amusan 2015). In some cases, these MPCs will discover drugs, but because they are not obliged to tell or explain to stakeholders how they found and tested their newly introduced drugs under secrecy that is allowed as put forward by World Trade Organisation (WTO). At the same time, institutions that ought to confirm their usefulness for a certain ailment hardly pay attention to this unless it has become a source of health challenges to state or community. This is prevalent, even in developed states.

In the area of human rights, several studies (Humphreys, Caulkins & Felbab-Brown, 2018) confirm lack of observation of human security when it comes to profit of MNCs in general of which PMCs are also part of the game despite the import of second and third generations human rights (Gear 2010). As much as it is part of the social contract between the governed and

governors/government, health of a state's citizens is paramount, but service providers that should see this as one of the most important aspect of their social CSRs hardly observe this. In some cases, different drugs would be introduced to different regions for the same ailment. The issue of HIV/AIDs readily comes to mind when stages of administering Anti-retroviral (ARV) drugs was introduced in Europe and America based on CD4 count while one-size-fits-all approach is the case in Africa. This raised many questions by the South African government under Thabo Mbeki (Chikane 2013). This caused a series of arguments between PMCs and Department of Health under Mbeki that CIA agents were sent to South Africa for a regime change in the country (Chikane 2013). To confirm lack of CSRs by MPCs, generic drugs from Asia and Brazil were kicked against to eradicate deadly diseases in Africa on the notion that they embarked on rigorous research to develop their drugs and therefore should recoup the cost of R&D for their companies' sustainable development. In a bid for South Africa to follow WTO and Trade-Related Intellectual Property Rights Agreement (TRIPS), a new law was enacted for compliance. In response to this, the Chief Executive of GSK, Jean Pierre Garnier (Nwoke 2006: 131) was of the view that:

The key concern for the industry was that the South African Legislation was vague and ambiguous and in particular, the law appeared to give the government the freedom to override patents of any medicines at their discretion. This would have undermined the industry's ability to provide new and better medicines...In the heated debate around the court case it has been difficult to convey the overwhelming truth that the most significant barriers to comprehensive treatment for HIV/AIDS in the developing world are lack of funding and public healthcare infrastructure.

The above quotation signifies lack of priority of developing states' health challenges by MPCs.

Branding or packaging is another strategy embarked on by MPCs in the form of marketing. They spend a fortune on advertising so as to make profit irrespective of their drugs side effects. They have wherewithal to advertise on various social media and in different languages when targeting some people and environment. This is common when certain drugs are rejected in some part of the globe, but due to the level of poverty in developing states, they prefer to introduce such to them with aggressive advertisement (Mamu 2017).

Regarding inputs for drug making, it is confirmed (Bond, 2006) that vital ingredients for drugs are from developing states, mostly from Africa, but MPCs hardly acknowledged this and follow what WTO and Convention on Biological Diversity (CBD) on GIs, PIC, ASB and the conservation of biodiversity; the

sustainable utilisation of indigenous biological resources (IBR); and fair and equitable benefit sharing (Amusan 2017). This amounts to looting of the highest order, which is described as sub-imperialism in a guise of new discovery and an avenue to patent through intellectual property rights (IPRs) (Narula 2014); that continues to generate argument in the field of law and social sciences (Amusan 2017; Chang 2010; Onimode 2000).

Because of the power that MPCs have, they sometimes petition drug regulatory bodies and, in most cases win to the detriment of the people's health (Humphreys, Caulkins & Felbab-Brown 2018). They are also in control of supra-national institutions such as European Union (EU) that may call for a united position on banning certain drugs in market. Not too far from this is the politics that involves the activities of the UN agencies such as the World Health Organisation (WHO) and approval of some drugs at the global level. Instances occur when drugs discovered in the developing states are tagged as not scientifically proof for human consumption. An instance of this is a vaccine discovered by Jeremiah Abalaka, a Nigerian medical doctor, to have been a cure for HIV/AIDS. Nigeria government, possibly because of pressure from the West and its PMCs, stopped the vaccine to be tested among Abalaka patients, even if they gave their consent for trial. After court ruling against government position supporting administering of the vaccine, it was rejected by the Abuja government under Olusegun Obasanjo (Leo & Okafor 2015). Secrecy that is allowed in scientific breakthrough in developed states, is ironically, not allowed in developing areas to give room for bio-piracy that is known with MPCs and their home states' research institutions (Shah 2010).

In a bid for MPCs to have more sales, they embark on lobbying with bribery to add more drugs to OTC. Many cases occur when drugs meant for headaches, heartburn, common cold, musculoskeletal pain and other psychoactive drugs are displayed on counter that patients, in a pretext of suffering from these sickness will buy, but are meant to make them high (Humphreys, Caulkins & Felbab-Brown 2018). Some drugs that are classified as BTC to avoid drug abuse and self-medication are prescribed freely by physicians because of their unholy alliance with MPCs for their profit motive. The same applies to pharmacists who should be custodian of health safety. Private pharmacies are always looking after their profits as against utilitarian approach to drug dispensing. This problem is common in Africa because of low level of education and a bid by MPCs to make profit out of banned drugs in the developed states.

MPCs and Africa

Africa has been considered as a dumping market for PMCs. The three giants' drug manufacturing companies, GSK, Pfizer and Sanofi-Aventis, always send

rejected drugs in the western world to Africa and other developing states (Humphreys, Caulkins & Felbab-Brown 2018). Not only this, they also use Africa as a Guinea-pig to test the effectiveness of their newly produced drugs as discussed above. An example of this is the Kano crisis when in 1996 Trovan was shipped by Pfizer, an American MPCs to the city of Kano because of outbreak of meningitis where it claimed the lives of 11 children. It is a common knowledge that some drugs that are banned in Europe and America are flourishing in African market. In 2018, some malaria drugs such as Amodiaquine, Flavoquine, Alaxin, Artemax and Amodiaquine, were shipped to Africa because of their negative effects on patients liver. Because of one-size-fits-all approach of MPCs, their alliances with physicians and pharmacists would not allow the drug prescription and administering to consider medical history of patients before prescription (Ofem, Nna & Archibong 2014).

Due to aggressive advertisement in many of African states with different local languages, rural dwellers are the most culprit of illicit drugs because they rely on information they receive from radio and television about drugs to take for certain ailment. Couple with this is the lack of professional health officers in the remote areas that can serve as guide for the types of drugs to take.

Because of monetary reward in the urban centres, physicians and pharmacists prefer to work either in public or private hospitals where they will have more opportunities than those in the rural areas. Ironically, in Africa, rural dwellers/population is more than urban dwellers. These are the jugular of food production, but lack necessary health care system that can sustain their health challenges. The implications of this are among others, dispensing either expired drugs or illicit ones that have been banned in western states. The multiplier effects of this are among others that more pressure will be on government hospitals to cure the adverse effects of expired drugs and unsustainable drug administration in remote rural areas of the African states.

Also added to this is the issue of brain-drain. Many of the health professionals trained in Africa find their ways to Europe and America where they will have access to modern technology and receive better payment as against African situation where they get less than their counterpart in Europe. In such a scenario, quack doctors who hardly pass through medical school will be the next point of call when professionals are not available. In other word, when the best brains leave the region for greener pasture in the west, their average counterparts will be left in charge of the health system back at home. The implication of this is that these are the people targeted by sales representatives of these multinationals to promote their business despite the fact that they could not prescribe medication based on patients' health challenges.

OTC politics is another issue worth looking into as mentioned above. Many drugs that were classified as BTC in Europe and America are OTC in Africa.

There is no functioning regulatory body that could check these in many African states. Food and drug administration agencies that were set up by many African states have become a source of corruption and enrichment of their staff who should look after the state of drugs in the market. At best these agencies often lack institutional capacity to deliver their lawful duties. Worth pointing out is the cartel like operation of many drug sellers that if drug regulatory institution and their head are not ready to yield to their demand, they sometime threaten the head of such establishments. Dora Akunyili, former Director-General of National Agency for Food, Drugs Administration and Control (NAFDAC) in Nigeria, was reported to have survived two attempted assassination in her home state of Anambra because of her anti-fake drug war she mounted against some retailers in Nigeria (Iginla 2014; Johnson 2014). So powerful are these retailers that they could do anything to maintain the *status quo* that is killing thousands of people each day in the continent. This is because of usual juicy present each year for any retailers that meet a certain sales target at the end of the year. Such package, a tactical means to promote their products is a way to promote unethical business as discussed elsewhere (Amusan 2015).

Capacity building in the form of introducing new drugs to the market is another tactic that MPCs are employing in Africa. As mentioned earlier, some drugs that are rejected and take out of market in developed world would be introduced to Africa market. In a bid to cover their R&D costs, they go into partnership with dubious physicians and pharmacists in the form of training and introduction of new product. Because of a need to capture market in the era of globalisation, where competition is acceptable, side-effects of such drug will hardly be mentioned. The same applies to differentiation on their brand names. Problem of line extension is not only contradictory, but also of health hazard in Africa. For example Flavoquine 200mg tablet (amodiaquine) FL/90ml may be introduced as the same with Flavoquine 200mg tablet (amodiaquine) B/240, the two produced by French MPC, Sanofi-Aventis, but are not for categories of malaria. For the interest of profit and discount from producers, they may prescribed by physicians and pharmacists irrespective of the health hazard this may cause. Also to save the cost of advert, these two products may be aired by mass media as the same product since they have the same generic name, amodiaquine. This is not peculiar to the French company mentioned, the same politics is on the table of Pfizer and GSK. Usurping the roles of physicians by pharmacists is a call for concern in Africa due to lack of medical doctors. Pharmacists, in some instances, abuse their power of giving correct advice to their patients. Instead of following the history of a sick individual, they only sell their products and neglect the need to examine and provide useful advice on the use and abuse of drugs by patients.

Coupled with the fact that illicit drugs are all over the continent, it is the responsibility of governments to regulate this and curb fake drugs in the market. Relevant institutions that should be in charge of this are not well equipped with relevant inputs to see to the eradication of fake and expired drugs in the market. These institutions are sometimes starve of trained staff to monitor the importation of drugs. Due to the questionable quality of education in Africa, many universities are producing half-baked graduates who may not be able to handle new technology introduced to detect quality of drugs imported; this is because of globalisation where education that should be part of second generation human rights is being commodified. Therefore, it implies that those who are educationally brilliant may not find themselves in classroom for a discipline of their interest for financial reason. This, in the long run, robs states of their best brain that ought to contribute to health sector. Another problem associated with regulatory authorities is the level of corruption where MPCs will bribe officials who should come up with authentic recommendations on each drug introduce to the market. This is rampart at point of drug entry into various African countries such as air and sea ports where customs, police, quarantine and drug agencies will be bribed by importers.

Due to the lack of capacity building among legislatures and politics of committee membership, the arm of government that is in charge of law making may not be able to have qualify legislators who could come up with functional regulatory law that will ban illicit drugs. Many people, based on their political connection find themselves in health committee despite the fact that they are not in medical line only to protect PMCs interests (Humphreys, Caulkins & Felbab-Brown 2018). This is compounded with the lobbying power of MPCs, which makes oversight function of law makers irrelevant in many of African states.

In a situation where PMCs physically move to some African states to produce drugs, they appoint their board members based on politically connected to national government by individual as against their areas of profession. In most cases, retired military officers and civil servants who could defend their interests would be appointed as members of this board. The reason behind this is to protect their business interests knowing that retired generals in the armed forces and civil servant would be very influential in such states. In some occasions, they appoint politicians who are godfathers to those in political power that can protect their illicit interest through their godsons. Armed with well-established legal luminaries that are politically connected PMCs paid for their services to right their wrongs in the court law for their business interest promotion.

One language among political and economic elite in Africa is that “I have interest in that case”. This implies that in a situation when regulatory officers

question activities of some PMCs, their board members that are politically connected will sweep such findings under the carpet for their financial interest as members of board of directors.

An instance of this is the Kano saga of 1996 that could not receive a lasting solution until 2015. A drug, Trovan, which was introduced to Europe and America, but rejected because of its health negative implications on liver, but found its way to Nigeria when there was outbreak of meningitis in the town none of the biggest cities in Nigeria, but educationally underdeveloped. This product from Pfizer, a giant PMC that had the backing of its home government and American Embassy in Nigeria was accused of administering a trial drug (Trovan) without following due process of PIC of patients. The MPC was equally accused of unethical approach to its trials when it fails to identify number of participants, methods adopted, analysis and academic conclusions. PIC is the basic aspect of research conduct in the field of natural science and humanities, a process that was intentionally not followed for profit motive of the company. In the case of Kano health care fraud by Pfizer, basic, standard and procedure (BSP) of clinical trials for the new drug was totally ignored. This was possible, as discussed above, due to corruption and support received from relevant authorities at the national and state levels of government together with health professionals in the three hospitals where the test were carried out without the knowledge of the patients. This misadventure killed 11 children and deformed another 181 (Mamu 2017; Pflanz 2009).

Pfizer denied any wrong doing initially and claimed that the virus that attacked the children killed them. It is documented that drugs that are banned in the western part of the world usually find their ways to Africa, especially to the remote rural areas with little education where their activities may not be questioned. This is the case of the northern part of Nigeria where education is very low, compared to the southern part of the country, therefore it is continuously an easy target for MPCs (Mamu 2017). This saga raised more questions than answers as it came out that those Nigerians involved in the drug trials were tagged as untouchable, ranging from powerful traditional rulers and related government officials who were in favour of the MPC in exchange for financial reward. Pfizer agreed to the error and unprofessional conduct of the trial of oral Trovan on children and paid out \$75 million as penalty as agreed through out-of-court-settlement; less than 50% of the payment was actually disbursed to the victims' parents while the rest were shared by government officials and traditional rulers.

As the usual practice of developed states embassy in developing areas, they are usually in support of their MNCs and use every possible means to woo the host government to alleviate if not sweeping such case under the carpet. In an attempt to expose government officials in Nigeria on their urge to share from

the \$75 million, the US Economic Counsellor in the American Embassy in Nigeria, Robert Tansey said that health related government officials in Nigeria equally wanted to share from the money that is meant for the victims (*Vanguard* 2010).

Because of the preponderant power of MNCs over their home and host states with their financial muscle, it was reported that former Attorney General of the Federation and Justice Minister, Michael Aondoaka was put under pressure to drop the federal government charges against Pfizer (*Vanguard* 2010: 11 December). In a bid to actualise this, special investigators were hired to look into the likely corrupt charges against the Minister and made available to local newspapers in Nigeria. Also employed to see to the cancellation of the case was the services of the former head of state in Nigeria, General Yakubu Gowon who approached the then Kano State governor, Mallam Ibrahim Shekau and of the President of the country, Umaru Musa Yar'Adua to drop charges against Pfizer. So powerful are these multinationals that they can be unethical in a bid to achieve their objectives of profit making (*Vanguard* 2010).

What is amazing is that America has existing law that should be invoked on Pfizer, Foreign Corrupt Practices Act, instead of the Washington government to penalise the drug companies, support was rendered to alleviate penalty that might be imposed on PMC, what a double standard at the highest order.

Because of the nitty-gritty of \$75 million sharing as compensation among stakeholders, the families of the affected children, State government, and unseen hands, it took 15 years in 2016 before the case was brought to a final conclusion. Out of about 530 victims that sought for compensation, only 192 were paid because of fraudulent act and technicalities from government officials that were interested in sharing part of the money. The lion share went to non-victims.

Recommendations and Conclusion

Having examined the roles of MNCs with particular focus on MPCs at the global level and Africa specifically, it is evident that the acclaimed roles of these companies as agent of technology transfer, source of foreign exchange, good at CSRs and sources of employment need to be re-examined in Africa and the developing world in general. Africa as trial test for new drugs means a lot for the underdevelopment of the continent. It is clear that MPCs are only looking after their financial interests so as to satisfy their shareholders who hardly know where Africa is on the world map (Chang 2010). African leaders are not interested in the development of the continent, due to their corrupt practices, but always out to satisfy the MPCs as discussed above. Because of their political and economic connections they only serve as gatekeepers for multinationals without considering the effects of their activities on African people.

There is a need for institutions such as African Union through NEPAD to come up with a support for pharmaceutical industries development. In 2010, AU through NEPAD came up with Council on Health Research for Development (COHRED) with the aim of Strengthening Pharmaceutical Innovation in Africa. This was endorsed by the African Ministerial Conference on Science and Technology (AMCOST). This should be empowered so that alternative to questionable R&D from the West will be available in the continent.

Issue of OTC and BTC needs re-examination so as to save African youths from drug abuse. Codeine that is tagged as OTC should be well monitored by pharmacists so that patients and those who are addicted with the syrup will not have easy access to it. To this, as is the case in America, some OTC should be upgraded to BTC for proper monitoring. There is a need for capacity building for regulatory institutions officials so that they will be able to monitor the importation of illicit drugs to the country. To achieve this, every state on the continent should provide national identity document, which should be provided in buying OTC. To achieve this, there should be a central database that will link all pharmacists together so as to curb several purchasing of cough syrups that many misuse.

In Africa, corruption at various point of entry is well known, mostly among custom officials, there should be a stiff regulation to curb such act. Technology is very important for government officials to work with when it is convenient for America and other Western states, they volunteer to train food and drug administrators in Africa, but only to focus on drugs that could be exported to the North. The same applies to custom, quarantine and immigration officers. There should be a body within AU to come up with regulatory framework of supranational in nature in monitoring the activities of MPCs in Africa.

One-size-fits-all approach to prescription of medication is another problem in Africa. As discussed above, while America came up with stages of drug administration on ARV for HIV/AIDS, it was not the same approach in Africa. This should be properly monitored by African governments with special focus on various African inspired international regimes and department of health of every state. Another perspective to this problem is to develop alternative medicine in Africa. The continent is well blessed with herbs that can be used to cure many diseases, but for the regulatory body at the international level, many research conducted in Africa would be tagged as sub-standard. This should receive holistic solution through Africa solution to Africa problems slogan. Some secondary school students from Anambra state just bag global science award in Washington DC for their invention of an application that can detect drug in Nigeria in August 2018. There is a need for Nigeria, for instance, to

develop such applications before it is patented by the West or to buy it from them for a peanut.

Lastly, the formation of BRICS (Brazil, Russia, India, China and South Africa) international organisation should serve as alternative for Western PMCs. India, China and Brazil are coming up with generic medicines, which need to be encouraged mostly on life-threatening diseases. In doing this, Africa will liberate itself from unequal-exchange that is imposed on the continent.

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Reasserting the Rightful Place of African Languages in Sustainable Development

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Introduction

The transformation discourse which has gained remarkable momentum in the world has brought to the fore many issues that arguably have a significant bearing on human development, particularly in the developing countries. Indigenous knowledge systems have come under scrutiny as many seek to ascertain the role of language in advancing the development agenda in Africa. Citing various reasons and arguments, some scholars have argued for and against the use of African languages in the development process. Based on a review of literature on this discourse, we are arguing in this chapter, that African languages have a role to play in advancing the development agenda in Africa. We focus on the definition of language and the value that it adds to any society. Martin, Ray and Sharf (2003) are of the view that language can perpetuate the interests of some groups, while at the same time neglecting those of others in society. The concepts of development and human development are also considered; highlighting the influence of language in achieving the three indicators of human development. We contend in this chapter with the common perception of English as the language of development. Does the dominance of English negate the value and potential of indigenous languages in development processes? The chapter also considers development from a human rights perspective; what it means to consider human rights in the context of development. In as much as we review literature on the potential value of indigenous languages, it is equally important to highlight the reasons why there is seemingly some degree of reluctance to develop and use indigenous languages for human development. In doing so, we hope to point out that these challenges cannot and must not be regarded as sufficient to disregard the urgent need to embrace indigenous languages for empowerment and development. Africa has to embrace its indigenous languages before they get extinct. Losing one's language implies losing one's heritage, culture and identity. In this view, we begin by defining the concept of 'language'.

Defining Language

Language is at the centre of many human activities. It is through language that we converse with one another and even engage in business transactions. Language helps us to make sense of the world around us. Olaoye (2013: 748) defines language as “an index of identity which serves as a repository of a people’s culture, industry and exploits”. Similarly, Brauthiaux (2002) sees language as a historical heritage and consequently, a repository of humanity wherein people can access knowledge, ideas and beliefs. Language can therefore be seen as a vehicle through which knowledge can be imparted. In support of the later, Nwanyanwu (2017) posits that language is the lifeblood of every community, whether large or small and is not only a cultural heritage, but also an intellectual heritage through which knowledge and local know-how are conveyed.

From a human rights perspective, language is regarded as a “right of the same level of importance as all other inalienable human rights” (Brauthiaux 2002). It is in this light that language must be viewed as a resource that facilitates the safeguarding of heritage and the promotion of cooperation and tolerance among different groups of people (Baker 2011). Furthermore, McNelly (2015) contends that language, as a community asset, is useful in the creation of social and economic bridges among different communities. Thus, it is a basic resource to negotiate social relationships with others, to construct our sense of the world by shaping values, meanings and understandings (Christie 2005; in Okafor & Noah 2014).

Language, as argued by Servaes and Liu (2007), is a mediating factor, which facilitates and contributes to a collective change process. This collective change alluded to by Servaes and Liu can be realised through “participation of citizens in the process of development facilitated or prevented by the use of language (Bamgbose 2000; cited in Erastus 2013). In other words, language holds the key to the establishment of true democracy and equality in a country. Language, as opined by Webb (1996), is therefore “the fountain of community development which provides access to economic opportunities as well as educational, social, political and cultural participations” (cited in Hlongwa & Ndebele 2017: 70). It is a social characteristic with a near universal importance in determining economic impacts, thus, an irreplaceable tool for sustainability (Jain 2011; Nwanjanwu 2017). However, contrary to the notion that language is the leeway to development and equality, some would also argue that it is just but an ideology. In this view, the Marxist perspective puts forward the fact that those who own and control the means of production have the keys to development, implying that language on its own is inferior and perhaps insignificant, in the context of development. Nonetheless, emphasising the essence of local

languages for any country, Prah (2013: 1) argues, “No country can make progress on the basis of a borrowed language”. He goes further and argues:

Every language is important... In the same token, African languages should be allowed to flourish. We do not talk about the ‘indigenous languages’ of France, Slovakia or the Czech Republic, so why do we insist on speaking in these terms when it comes to Africa?

As long as development is about people, the contribution that they are called upon to make by way of participation will require communication, dissemination of information, sharing of knowledge, feedback and acquisition of skills. None of these activities would materialise without the use of familiar language. Having defined language from various perspectives, it is thus essential to further discuss the concept in the context of development. We explore, in the next section, the concept of development itself, as it is conceptualised in various contexts.

Defining the Concept of Development

The concept ‘development’ is defined and understood differently in various contexts. However, what brings the different views of development together is the fact that for a very long time, development has dominantly been perceived solely in terms of economic growth. Put simply, it was only the economic growth of any country which was equated to development. In as much as economic growth is a necessary means for development to take place, there is increasing empirical evidence to suggest that “high GNP growth rates have failed to reduce the socio-economic deprivations of substantial sections of their populations” (Nayak 2008:1). Nayak (2008) contends that high income is no protection against the rapid spread of social ills in society. To put emphasis on this view, Nayak comments on how some low-income countries have been able to achieve high human development through the skilful use of available resources (2008). However, in the context of Africa, one could argue that development is not just about utilizing the available resources. Instead, it extends to the need to restore the continent’s stolen resources. Ironically, language is one of those resources. Reclaiming indigenous languages will be furthering human rights and restoring human dignity. Arguing for the place of indigenous languages in African development, wa Mberia (2015: 1) puts it this way:

Indigenous languages are much more than cultural phenomena...they are important vehicles for cultural transmission, identity building and values creation.

However, they also have the potential, like languages elsewhere in the world, to aid the communities that speak them in development... the languages are an important resource...indigenous African languages can contribute to the economic development and social progress of the African continent...they have an important role to play in a wide spectrum of areas... in early formal education, health campaigns, conflict resolution and peace building, adult literacy, mass media, confidence building and enhancement of self-esteem, and in internal trade.

In the context of the above, perhaps the important question to pose at this juncture is, what then is development? UNESCO defines development in the following way:

Development is complex. It is a holistic and multidimensional process which goes beyond mere economic growth and integrates all the dimensions of life and the energies of a community all of whose members must share in the economics and social transformation effort. Development must therefore be founded on the will of society and must express its profound identity (UNESCO, 2015:6)

For Sen (2011), development is all about “human freedoms- freedom to realise the full potential of every human life, not just for a few, nor of most but for all lives in every corner of the world”. Sen (2011) argues that development must be about expanding citizens’ capabilities. It is for this reason that Clark (2016) maintains that development for everyone must take into consideration human rights and human security, voice and autonomy, collective capabilities and the interdependence of voices. Reclaiming indigenous languages will instil a sense of ethics, revealing a profound inborn sense of solidarity, hospitality, mutual aid, brotherhood and the feeling of belonging to the same humanity (Langley 1979: 791, cited in Prah, 2008)

The shift from a simple construction of development as economic growth to human development places much emphasis on the idea that development must be measured by its impact on individual lives and must be able to recognise that a wide range of factors, freedoms and capabilities can and will influence development and quality of life (UNESCO, 2015). Human development is therefore conceived as a process of enlarging people’s choices and ensuring that people are at the centre of human development (Nayak, 2008) in order to influence processes that shape their lives. Consistent with this position is Nayak’s view that “development has to be woven around people, not people around development. In other words, it has to be development of the people, by the people and for the people” (2008: 2).

In addition to the above, the UNDP developed the Human Development Index (HDI) as an instrument for measuring human development. The human

development index (HDI) integrates three basic dimensions as measures of human development and these include access to quality education and leading long and healthy lifestyles and access to a decent standard of living. According to the HDI, development can be said to have taken place if the three basic dimensions have been positively impacted by development processes. Inequality, gender development and multidimensional poverty index have since been added as important dimensions of human development.

It can therefore be argued that for human development to take place there is a need to overcome any barriers and forms of exclusion in the processes of development. These barriers and forms of exclusion can present themselves in various ways and language used in development processes can be one of them. Consequently, development processes must therefore “take place in the broader context of human rights” (Wilhite-Babaci, Jaja-Geo & Lou, 2012: 619) in order to achieve the intended objectives.

The Role of Language in Advancing Health, Education and Economy

As mentioned earlier, language is a mediating factor, which can facilitate and contribute towards a collective change process. This section focuses on the influence of language in ensuring that development processes can realise the basic dimensions of human development, i.e. health, economy and education.

Sen (2011), as cited in Duxbury, Hosagrahar and Pascual (2016:3), is of the view that “cultural matters are integral parts of the lives we lead. If development can be seen as an enhancement of our living standards, then efforts geared towards development can hardly ignore the world of culture”. The importance of paying attention to culture in development processes further highlights the importance of language. Language is perceived as a repository of culture; it is at the centre of culture. Olaoye (2013: 748) concurs by stating that “language is a resource and it is hardly possible to talk of national development without including language which people use to formulate their thoughts and ideas”. Because language is a resource and a critical factor in facilitating the development process, it can be argued that language and development are irrevocably connected. However, the Eurocentric perspective views culture, specifically the fragmented African languages, as a barrier to development. It is precisely for this reason that colonial languages have dominated Africa and become languages of trade and development. However, as indicated earlier, language is a resource, a human right and critical for human development.

Similarly, Duxbury et al. (2016: 10) maintain that “culturally informed and sensitive development can inspire more participatory processes and can empower marginalised individuals and communities to participate in cultural and political life”. Therefore, to deny the influence of language can only

contribute to development process that people do not necessarily have control over and may consequently affect the impact and sustainability of such processes. In the words of Sen (2011), “a denial of local context and languages has and can undermine the sustainability of development efforts” and this he attributes to what he terms ‘capability deprivation’. Therefore, by contributing to the intellectual, emotional, moral and spiritual well-being of people, enabling everyone to exercise their human rights, including their cultural rights and in particular, language, can contribute to sustainable development (UNESCO, 2015).

Language and Health

Access to health care services is one dimension of human development and thus, it is included in the sustainable development goals and other national development plans. Although access to health care is paramount, it is health equity that determines the kind of health care services that citizens receive. The World Health Organization (WHO) (2018) defines health equity as:

...the absence of avoidable, unfair, or remediable differences among groups of people, whether those groups are defined socially, economically, demographically or geographically or by other means of stratification. “Health equity” or “equity in health” implies that ideally everyone should have a fair opportunity to attain their full health potential and that no one should be disadvantaged from achieving this potential.

Li (2017) also argues that health equity is a basic human right and the core value of universal health. Therefore, to ensure health equity it is necessary to recognise any ‘barriers’ and ‘forms of exclusion’ that could lead to unequal health among people of various and diverse backgrounds.

Health communication is at the centre of health care services and consequently, has an influence on health equity. In view of this, care must be taken to ensure that all barriers to effective health communication are addressed. This is largely because poor communication has a strongly negative impact on health outcomes and effective communication in healthcare settings invariably leads to better health outcomes (University of Rochester Medical Centre, 2004). To ensure effective health communication, Nguyen and Bowman (2007: 208) contend that “health communication needs to address issues of culture, language and literacy so that appropriate questions are asked and there is accurate exchange of information with patients”. Similarly, Li (2017: 208) emphasises the need to address cultural differences in communication, as they

can “lead to serious miscommunication”. Miscommunication, as highlighted earlier on, has a strongly negative impact on health outcomes.

Language of communication in health care settings has the potential to present itself as a barrier to universal health care. Meuter, Gallois, Segalowitz, Ryder and Hocking (2015) are of the view that understanding the role that language plays in creating barriers to health care is critical for the health care fraternity, particularly in contexts where there is continuing increase in cultural and linguistic diversity. Linguistic differences between patients and clinicians (patient-doctor communication) have led to many challenges including misdiagnosis, failure to adhere to medical advice, poor follow up and the inability of patients to disclose or adequately explain their health problems (Matthews & Van Wyk, 2015). The benefits of language-concordant health care in ensuring improved health outcomes cannot be over-emphasised.

A research conducted by the University of Rochester Medical Centre (2004) reported that “many patients are not satisfied with the quality of their interactions with healthcare professionals and that significant gaps in communication between patients and healthcare professionals are evident among the marginalised groups such as those with disabilities, low literacy, limited English proficiency or low socio-economic status”. Language therefore strongly influences health communication behaviours. The inability to speak English may hinder the search for health information and as a result, there is a need to bridge the current disparities in health by improving access to the quality of the health information for the socially marginalised groups (Viswanath & Ackerson, 2011:4), even in terms of the language of communication.

According to Li (2017: 209), it is unacceptable for language to be a barrier to universal health care. This suggests the need to address inequality in the health care sector, through acknowledging the linguistic differences and working towards bridging current disparities by improving access to quality health information for the socially marginalised and the diverse ethnic backgrounds. A case in point is the learning of *IsiZulu* among the student doctors at the University of KwaZulu-Natal. This is done to uphold citizens’ rights to access health care in their preferred language (Matthews & Van Wyk, 2015) and to facilitate quality health care.

As alluded to earlier, the denial of local contexts and languages has the potential to undermine development efforts. Cultural and language sensitive health communication initiatives will go a long way in empowering citizens and in the same vein, ensuring health equity for all. Language is a means through which patients can formulate and express their thoughts, hence, failure to recognise the influence of language in the health care sector might have huge implications towards ensuring quality health for all.

Language and Education

Language in education is seen as a capability that has the potential to support human well-being and social justice. Language in education is as equally important as the curriculum itself, teacher capacity and effective leadership (UNICEF, 2016). This view concurs with that of Olaoye (2013: 748), who maintains that language is a mechanism through which knowledge can be imparted; thus, emphasising the role of language in education.

Language in education plays a significant role in the learning processes of students. Brock-Utne (2012) asserts that: “It is through language that students develop ideas and concepts of the world around them. It is also through language that students make sense of the input they receive and it is through language that students express their understanding of what they have learnt”.

This suggests that when ‘unfamiliar’ language is used in the process of learning, it can become a barrier to learning. There is increasing evidence that countries promoting instruction in unfamiliar languages, particularly English, may exacerbate income inequalities, as well as other social problems. This is because many students who have not mastered the language of instruction and testing fail to make sense of the word, whether spoken or written. Glewre *et al.* (2009) found that the use of books written in the English language in primary school was useless to most children (in Kenya), as they could not read them with any real level of comprehension. Even at University level, students fail, particularly their examinations, not because they do not know, but they simply do not have the ability to comprehend and explain some of the concepts in English. Although many may seem to have command of the language, it is the writing and decoding of texts that reflect a challenge in using English as the only means of teaching and learning. In this view, the Coolangatta Statement maintains that:

Historically, indigenous people have insisted upon the right of access to education. Invariably, the nature and consequently the outcome of this education has been constructed through and measured by non-indigenous standards, values and philosophies. Ultimately the purpose of this education has been to assimilate indigenous people into non-indigenous cultures or societies (Read, Meyers & Reece 2006: 231).

The over-reliance on English as the only medium of instruction has arguably contributed to a disconnection between students and their communities. Brock-Utne (2012:778) echoes similar sentiments, arguing that “the use of foreign languages as media of instruction disadvantages learners and erects barriers between school and community”.

In light of the above, it is safe to argue that the quality of education cannot be seen as an issue separate from the language of instruction. Trudell (2016) concurs that the language of instruction is one of the important features that contribute to effective learning outcomes in the formal school environment. Furthermore, Trudell states that without getting this feature (language) right, successful learning is very difficult to achieve (2016). Sen (2011) argued that human development is about enlarging citizens' capabilities and therefore, care must be taken to ensure that all the processes involved in any development efforts are geared towards expanding the human potential and do not lead to capability deprivation. The use of unfamiliar language in education can arguably lead to capability deprivation for many students who have not mastered well, the media of instruction. Such a scenario will only keep students as consumers of knowledge, with little or no potential to become producers of knowledge. This is so because we have defined language as the meaning-making mechanism, which when taken away, incapacitates others.

From the discussion so far, it is thus safe to argue that language is a resource, it is a vehicle through which knowledge can be imparted and processed. Therefore, African languages must be developed and given their rightful place in education. African languages must be developed and promoted by using them in education as the media of instruction and subjects (Brock-Utne 2012). Where African languages have been in education, the results have shown an increase in student participation, a decrease in attrition, an increase in family and community engagement, as well as the enhancement of the cognitive learning processes (UNICEF 2016). Coyne (2015) is of the view that the use of African languages in education is a way to contribute sustainably to societal transformation and economic progress by fully exploiting the cognitive and creative potential of young Africans.

Language and Economy

As we have shown in the preceding discussion, language is an asset that cannot be overlooked, let alone undermined in any development process. It is for this reason that Arcand and Grin (2012) emphasise the need to pay particular attention on the role of language on development. We explore briefly, in this section, the relationship between language and economy.

Lee (2012) is of the view that a common language between two countries has the potential to raise incomes in each, by facilitating trade and foreign investment at lower costs. Meltiz and Toubal (2014) concur with the latter by asserting that a common language in business does increase trade, which then contributes positively towards higher incomes. In various contexts, English has become, or is that 'common language' for trade. English has gained a significant

status as a ‘de facto international language’ thus becoming the language for business and many other fields (Arcand & Grin 2012). However, Meltiz and Toubal (2014) argued that while a common language in business definitely increases trade and contributes to higher incomes, there is no sufficient empirical evidence to suggest that English itself plays a special role in trade. They further revealed in their study, that English plays no special role, as compared to other common languages (Meltiz & Toubal 2014). In line with this thought, Lee (2012) states that better foreign language abilities often open up more lucrative opportunities. Sen (2011) further points out that developing capability in more than one language is a key enabling factor in accessing goods and services, as well as labour market opportunities within an increasingly globalised economy.

Language contributes to the development of human capital, which is essential for increased access to economic opportunities. It is precisely on this basis that employment and other opportunities are in most countries predicated on fluency in the national language (de Varennes 2012). Prah (2008) highlights the existence of a tradeoff between more general human capital and English specific human capital, as well as the conflict between promoting internationally useful language against one that would preserve local culture and prepare people for domestic focused employment. de Varennes (2012: 30) argues that:

Where the use of indigenous languages is excluded or not provided for, few jobs would generally be available for speakers of indigenous peoples. Even where indigenous peoples are able to use the national language, they may not be considered to be as qualified or competent as ‘native speakers’ of the national language, and therefore still find themselves disadvantaged in terms of employment rates.

Patterns of exclusion based on one’s ability to speak the national languages limit the economic opportunities for indigenous people who, for the most part, represent a larger proportion of the population. Therefore, to regard English as the only appropriate language for human capital development and ultimately access to economic opportunities leads to deprivation and limited economic opportunities for the masses. On that note, it is sensible to discuss the arguments against the use of English as the language for development.

English: the Language for Development

Now, given the discussion presented so far, it is evident that the misconception about English being the language for development is far from being cleared. English is the most spoken language in many parts of the world. In Ukoyen’s (2005: 34) words, “One look at the map of the world reveals that

English now exists in every strategic corner of the globe, either as a mother tongue or as an official or second language". In addition to this, Egwuogu (2011: 31) summarises that the English language "functions across the world as the language of power and of inclusion and exclusion in participation in global activities". These assertions imply that despite being a colonial heritage, the English language has dominantly influenced the linguistic landscape of many nations. The language has become part of our lives and has overlaid many indigenous languages, despite having penetrated as a simple remnant of colonialism. It has become the language of management and governance, thus, "...increasingly growing in strengths, pushing other world languages backward in the global space, opening new frontiers" (Egya 2009: 35). In the same way, Svartvik and Leech (2006: 7) point to the fact that "As a window on the world, English is looked upon as the best means to achieving economic, social and political success". But the question is, what about our own indigenous languages?

Indigenous Languages, Indigenous Knowledge and Community Development

As argued in the previous sections of this chapter, language is the centrality of any knowledge and cultural retention. The general consensus is that language is what shapes one's personality and culture, as these are communicated in one's language. Thus, "language is the principal means whereby culture is accumulated, shared and transmitted from one generation to another. Language expresses the uniqueness of a group's world view" (Kirkness 1998: 4). This means that when we talk about indigenous knowledge systems, the aspect of language becomes critical. Unfortunately, many indigenous languages tend to disintegrate in the name of sham Euro-America civilisation and some school curriculum which encourage the use of English as the medium of instruction in schools. The implication is that human and cultural diversity are not being preserved when indigenous languages are not being supported. In some instances, though, for example, in South Africa, most indigenous languages are regarded as official national languages which are offered as mandatory subjects for first years in the mainstream universities. This pedagogical shift is one way of revitalising indigenous languages, thereby provoking the cultural hegemony inherent in most institutions of higher learning.

In the context of the above assertions, the implication is that language is the mainstay for any culture to thrive. In the same way, language can be the key driver of meaningful development, in the sense that people get to interact and live together as societies through the implementation of languages (Olaifa 2014). The effective participation of citizens, especially in democratic processes,

signposts the necessity of indigenous languages. In South Africa, Namibia, Zimbabwe and many other African countries, the use of indigenous languages in the education fraternity has been highly advocated for, the argument being that education is a major factor in development. The point is that the success of any human activities hinges on the effective use of languages (Ayodele 2013), as people can comfortably share their religious, economic, political and social experiences, ideas and emotions through language. Thus, using indigenous languages in development processes could nurture communication and enhance national development (Emeka-Nwobia 2015; Benson, Okere & Nwauwa 2016). Ayodele (2013: 2) highlights the essence of language in this way:

... language is an important instrument for the development of human beings, as political animals. No meaningful development can take place in a human community without language. As an instrument of communication, language, makes it possible for the people in any environment to interact and co-exist, thus paving way for the continuity of the society. Human beings get equipped for their maximum self-realisation and self-development through the use of language.

From the above assertion, the point is that it is difficult for human beings to celebrate economic and technological prosperity in foreign languages. Thus, indigenous languages should be the catalysts for community development, as they have the potential to influence cultural and national identity (Emeka-Nwobia 2015). This implies that communities should be educated in indigenous languages, with regards to developmental issues. Regarding the importance of language in general, Ani (2012:110) puts it this way:

The appeal of language resides precisely in its capacity to meet the needs of man for self-expression and for communication of experience in his day-to-day engagements with the world around him. Man needs language for the dissection and analysis of material reality and spiritual experience, as well as for formulation of hypothetical statements, theories and belief, as well as value systems. In other words, beyond facilitating communication of experience, a language must enhance man's cognitive abilities and functioning, if it is to be of permanent relevance or survive through the ages.

The above sentiments signpost the need to promote indigenous languages. It is a fact that many societies are battling the loss of their indigenous languages. According to Olafia (2014), this is also a result of many of the languages not being properly documented. In this way, efforts should be made to ensure the development and promotion of indigenous languages. Jibir-Daura (2014) noted that indigenous languages are not perceived as being able to accelerate

development, but are rather regarded as tools for facilitating positive change and advancement. In other words, indigenous languages are not highly revered in most communities where English is still perceived as the language of power and development in life. Referring to Nigeria, Ogunmodimu (2015:156) pointed that: “Today, English has grown to become the official national language of Nigerians and continues to play important roles in the nation as the language of education, media, religion (especially the Pentecostal Christian Faith), and the language of politics, governance and law”.

If people are made to lose their language, that means they are also losing their heritage, identity and thereby forced adopt other people’s culture and identity. The point here is that indigenous languages should be promoted and revitalised, for their people to survive, or else they become extinct. Having said this, another important question to ask is, what is the role of the media in promoting the use of indigenous languages to achieve development for all?

The Media, Indigenous Languages and Development

The development of any society is premised on information. On the other hand, the media are strategically positioned to ensure that information for development is disseminated in the language that is acceptable and comprehensible. Given this scenario, the question then is, if the media disseminate development information in the language that is foreign to the recipients of the message, how is the society going to comprehend something that is not communicated in their indigenous language? Moreover, how would the society participate in issues of sustainable national development, if these issues are not communicated in their indigenous languages? What this means is that the media ought to package information or messages in the most effective way that ensures understanding on the part of the ultimate consumers and users of the information. In this case, the media should thus assume their effective role of collecting, disseminating and promoting information for development purposes. Information is a requisite component that encourages any form of development. As alluded to earlier in this chapter, development entails: “...the optimization of the natural and human resources of a nation for the fostering of political unity, for the efficient production and distribution of goods and services, for the efficient management of the production system and for the enhancement of the social and economic well- being of the people” (Bashorun 2011: 40).

The media thus must ensure development by alerting and encouraging the general populace to participate in issues of national concern. Therefore, language remains the necessary accessory for communicating development (Bashorun 2011). As a way of promoting national development, the media are

thus mandated to provide the tools for forming opinions through encouraging information flow between the citizens and the government in the most comprehensible language. Unfortunately, most media platforms favour English as the language for communicating development, thereby burying the indigenous languages. However, it is imperative to acknowledge the fact that most societies are heterogeneous, meaning that if the media are to speak to a diversity of people, they need to use the language that is most accessible by the majority of the citizens, which often happens to be the English language. Therefore, in this instance, using indigenous languages to communicate development might rather divide and not unify societies. Thus, in communicating sustainable development, indigenous languages only become effective if they target their direct linguistic communities. As a result, indigenous news media outlets are limited, often due to the limited listenership or readership, which makes them unpopular. In this instance, “for any nation, particularly in the 3rd world, to be relevant and derive the maximum benefit from the opportunities that abound in every area of human need, for personal advancement and national development, English is a *sine qua non*” (Babajide 2002: 52).

To summarise this section, it is a fact that using indigenous languages is critical for community development. Sadly, when developmental issues are considered, the language aspect is not given adequate consideration. Thus, the role of indigenous languages in communicating information, attitudes, values and ideologies, tends to be ignored. It is a fact that language is critical when talking about development, especially, if carefully implemented by the media. For citizens to productively participate in development issues, it has to be done in the language that they can effectively express themselves, meaning that the language has to be appropriate and properly implemented. Indigenous languages should therefore be considered as the most appropriate for sustainable development. The reason why language is not considered in development discourses could be that its role is not entirely understood. It seems mistaken that development can be driven even if people speak any language. Unfortunately, it should be appreciated that how language use changes, is directly linked to the broader cultural and social processes. In fact, language is a necessary tool for negotiating social relationships, as well as for constructing our sense of how we perceive the world by shaping our value systems. Therefore, no matter what definition is given to development, it cannot be effectively achieved without considering the notion of language. Developmental activities would seriously crumble if language is not regarded as an important factor. Development entails the interaction of people with ideas to construct messages and meanings, which are derived from language. In view of this, the notion of linguistic rights resonates very well with the current developmental agenda

which emphasises ownership of the development process and materialities of development and participatory empowerment of the respective communities. Sadly, whenever development issues are concerned the notions of language and culture are often downplayed. In a sense, it is time we regard this intangible cultural heritage, not as a secondary element to development, but as a main ingredient in the process. Talking about language as a human right, it is also imperative to dissect the concept of development from a human rights perspective.

Development from a Human Rights Perspective

Development is a comprehensive economic, social, cultural and political process which aims to continuously improve the well-being of a community or entire population on the basis of their active, free, as well as meaningful participation in development and in the equal and fair distribution of benefits yielded from thereof (Declaration on the Right to Development 2001; 2011). Development by virtue, is an alienable human right which every person and all people are entitled to participate in, contribute to, as well as enjoy the economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized (Declaration on the Right to Development 2011; United Nation 2011b; Organisation for Economic Cooperation and Development 2008). Development should take place in the broader context of human rights and explores the links between three areas namely language, education and development.

The United Nations Children's Education Fund (UNICEF 2011) emphasises that the empowerment of the poor and the vulnerable populations, as well as the integration of human rights, calls for free, informed and meaningful participation that can be institutionalised and can affect public policy choices. In order to realise the participation of communities, there is a need to use the language of the communities for whom development is sought. This ensures the mutual-benefit endeavour between the locals and the external stakeholders and also recognises the universality of human rights or the right to development.

Education is a fundamental tool in achieving development. Rights in education develop people's capabilities, including educational capabilities – such as local language reclamation that will challenge social norms and Europeanisation (Robeyns 2006). Of late, African education neglects local context and local people's rights to their own indigenous histories. The present practices of education in the European languages are completely contrary to rights in education, which include, but are not limited to equal respect,

opportunities for meaningful participation and respect for language, culture and religion.

The United Nations Committee on Economic, Social and Cultural Rights (UN CESCR) notes that state parties are required to ensure that education conforms with the aims and objectives as identified by the General Comment No. 13, on the right to education:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities ... Education in all its forms and at all levels shall exhibit the following interrelated and essential features: (a) Availability ...; (b) Accessibility ...; (c) Acceptability ...; [and] (d) Adaptability (UN CESCR 1999).

All human beings have a responsibility for development, individually and collectively, taking into account the need for the full respect for human rights and fundamental freedoms, as well as the duties to the community, which on its own ensures the free and complete fulfilment of the human being ((Declaration on the Right to Development 2001). Development takes place in an environment of increased accountability, transparency and participation (OECD 2008). The use of local languages as already alluded to enables communities to actively participate in development programs.

Development and human rights are interlinked (Sano 2006). The Declaration on the Rights of Indigenous Peoples (2007), the Declaration on the Right to Development (1986) and the African Charter on Human and Peoples' Rights (2005) point out that both development and human rights are indivisible, in that both aim to promote the well-being and freedom, based on the inherent dignity (UN 2011b) and equality of all people. In addition, human rights should be respected in all contexts, including development. According to the African Charter of Human and People's rights (2005), African traditions and values of civilisation should be reflected on the concept of human and people's rights. The indivisibility of development and human rights as stated by the United Nations Development Plan (2000) enables governments to work hand in hand with policies in eliminating poverty, sustaining livelihoods, promoting equality, protecting the environment and capacity building, which will in turn assist in mainstreaming human rights in the development sector.

Article 26 of the Universal Declaration of Human Rights, in affirming the right to education as a human right, states that: "Everyone has the right to education. Education shall be free...Education shall be directed to ... the

development of human personality and to the strengthening of human rights and fundamental freedom”.

All human beings are entitled to their human rights without discrimination on the grounds of language, race or colour (Report by the Global Citizenship Commission 2016). Language is part of culture and it is a human right (Skutnabb-Kangas 2000). Therefore, consultations should be done with communities and that all voices are required in the decision-making process. Communities should be able to freely choose the ways and means with which to achieve the full development of all individuals. Communities have the right to exercise full control over their natural wealth and resources (ibid).

Africans should benefit from the resources present within their natural wealth and resources present within their national territory and choose how to utilise these resources. In order to promote development, equal attention and urgent consideration should be given to cultural rights, social, economic, civil and political rights (Declaration on the Right to Development 2011). All human beings have a responsibility for development. According the UN Human Rights’ Guide (2012), the state must adopt appropriate legislation, policies and programmes to ensure the realisation of human rights.

The following quotation emphasises the dimension in which development contributes to human rights:

... truly, sustainable development is possible only when the political, economic and social rights of all people are fully respected. They help to create the social equilibrium, which is vital if society is to evolve in peace. The right to development is the measure of the respect of all other human rights. That should be our aim, a situation in which all individuals are enabled to maximize their potential and to contribute to the evolution of society as a whole” (Declaration on the Right to Development 2001:15)

Human rights contribute to the human development approach. This is illustrated in Figure 1.

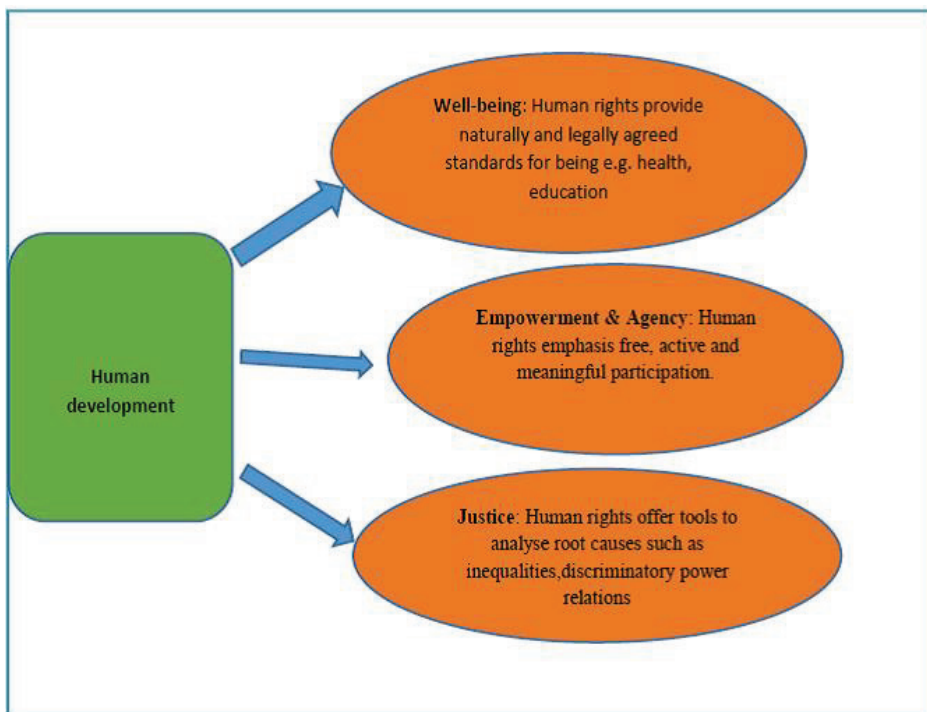


Figure 1: The human development approach

Source: UNDP (2012)

As indicated in Figure 1, the human development approach is about advancing human wellbeing, empowerment and justice. In all these aspects, language serves as an important tool of communication amongst people (Uzoma 2016). Languages define the path of socio-economic construction and as such language is central to any discussion of human development (UNDP 2016).

Colonialism made it possible for linguist domination to take root, to the extent that very few countries encourage education in African languages. If the human rights violation resulting from foreign domination and colonialism are done away with, then the development of the greater part of mankind will be achieved, particularly, through the promotion of indigenous languages. Yurranydjil *et al* remarked: “Our language is like a pearl inside a shell. The shell is like the people that carry the language. If our language is taken away, then that would be like a pearl that is gone. We would be like an empty oyster shell.”

The United Nations (2000; 2010b), through its set of targeted goals, such as sustainable Development Goals (SDGs), aims to bring about development. Poverty and low human development, climate change, population growth and demographic changes, continue to remain significant political and economic challenges to sustainable development, particularly for developing countries. The SDGs act as management tools to help countries develop the

implementation and monitoring strategies for achieving the SDGs, as well as to monitor progress (Report by the Leader Council of the Sustainable Development Solutions Network 2015). At the heart of the SDGs is the recognition that for this global initiative to be effective, all persons need to be included. “Language is the key to inclusion. Language is at the centre of human activity, self-expression and identity. Recognising the primary importance that people place on their own language fosters the kind of true participation in development that achieves lasting results” (United Nations Educational, Scientific and Cultural Organisation 2012).

In the Namibian context, the fundamental human rights and freedoms are enshrined in Chapter 3, of the Constitution (The Namibian Constitution 1998). Government policies and efforts towards human development have improved Namibians’ standing on the human development index (HDI) from 0,556 in 2000 to 0.640 in 2015 (UNDP5, 2017-2021). The HDI is a summary measure of three dimensions of human development: living a long and healthy life (measured by life expectancy), being educated (measured by adult literacy and educational enrolment) and having a decent standard of living (measured by the purchasing power of per capita income) (UNDP5, 2017-2021).

The methods of measuring development are pioneered by the UNDP, in its Human Development Index, as a valuable guide to obtaining a true picture of the countries’ development. The Human Rights Index (HRI) provides a clearer picture on education, housing, health, poverty, gender, human security, trade and financial flows, income/composition of resources, demography and mobility and communication (Human Development Reports 2011; UNDP 2000). In addition, the HDI marks further development on the indicators for measuring the average achievement of a country in three dimensions; a) longevity; b) educational attainment; c) standard of living (UNDP 2000). These show how much of a human right is being implemented (UNDP 2012; Steiner 2000). Education as a fundamental human right and being an important tool for development, should be based on the local languages so that all societies can make a contribution towards their communities’ development. In particular, “strengthening early education helps to equip young people and communities with sufficient knowledge, capacity and self-confidence to engage in decision-making about development and to protect their rights” (United Nations Educational, Scientific and Cultural Organisation 2012: 39).

The National Development Plan 5’s (NDP5) principles are of sustainable development namely, economic progression, social transformation, environmental sustainability and good governance. These principles are aligned with Namibia’s commitment to eradicate poverty and inequality, as outlined in Vision 2030 and the Harambee Prosperity Plan (UNDP5, 2017-2021). These frameworks are drawn from international and national best practice which

recognises the linkages between economic growth and social progress in the fight to eradicate poverty and accelerate development.

Countries are encouraged to use the framework and core indicators in the way that best meets their specific needs related to sustainable development priority setting, policy making, monitoring and evaluation. The framework and core set will play different roles, depending on the state of indicator development in a specific country (UN 2001). Policies, in particular language policies as already discussed are central to development. Many African language policies have however opted for a foreign language (e.g. English, French or Portuguese) to be their official language. Foreign languages in general act as gatekeepers in education, jobs, political participation and self-esteem (Laitin & Chandran 2014). In the end this has a negative impact on the economic development of a country. It is therefore a call for African countries to revisit their language policies so that indigenous languages (as it is the case in South Africa) equally share the same prestige as foreign languages so that development is realised.

Dissenting Views on the Use of Indigenous Languages for Development

Although there are growing calls for the need to embrace indigenous languages for human development, this has also been met with some degree of resistance as some perceive this as an agenda that cannot be realized. While we lament the natural death of the indigenous languages, and arguing for the need thereof, in promoting development and cultural preservation, the dilemma regarding their adoption and implementation has also been highlighted (Olagbaju 2014). Below are some of the issues indicated.

Language Policy and Planning

At the heart of this important discussion is the issue of language policy and planning, which has a great impact on the development, as well as the empowerment of indigenous languages. In this view, Bamgbose (2011: 12) asks:

What is the prognosis for a change in existing situation towards an enhancement of the status and roles of African languages? Do policy-makers have a proper perception of the changes and possibilities? Are they willing to translate the possibilities into viable language policy, which will be backed by a language plan?

What the above questions imply is that policy-makers in this regard are lacking the capacity to understand that language policy is not separate from social policy. In other words, the success or failure of language policy, as well as

its implementation, rests with the policy makers. For Bamgbose (2003: 45), the major stumbling blocks in language policy development lie in the following: “ethnicity and national cohesion, bridging the gap between the elite and the masses, language of education, and multilingualism and development”. In most African countries, most of the issues date back to the colonialism epochs, as they are often associated with issues of inequality, dispossession, exploitation, marginalisation in many aspects, including language. In the context of education, it is still evident in many African states, that their language policies still favour the foreign languages as the instructional languages. Despite many constitutions emphasising language equality, and despite evidence that learning is more meaningful when done in one’s own language, many African countries are still experiencing this linguistic enslavement. If we argue that people are the centrality of development, then their indigenous languages should also be central to development. This is confirmed by Ngugi (2013b: 6) who argues that:

If we believe that people are the basis of development, then the language or languages that they speak are the basis of that progress and every language policy and planning should incorporate this premise. African languages must be at the frontline in the discovery and invention of knowledge in the arts, in the sciences and technology.

This means that speaking of development in colonial languages is by default marginalising the majority and this therefore goes against the development agenda.

Lack of Support from Families and Communities

As an essential aspect of linguistic diversity and cultural identity, language is imperative in every nation’s progress, in terms of fighting diseases, poverty and hunger, hence, it has to be part and parcel of the national planning process (UNESCO 2015; Olagbagu 2014; Ofulue 2011). In affirming that indeed indigenous languages are endangered and may get extinct if no action is taken, UNESCO (2009: 16) indicated that: “Languages disappear for many reasons, but usually it is because the speakers are pressured to adapt to a more dominant culture. The imposition of the language of the colonialist, chiefly English and French in most African nations, no doubt has impacted negatively in the development of the continent”.

The learning of language starts in the family, and then the community. If these two institutions are eroded, it is very difficult for the younger generations to learn their mother tongues. In this 21st century, it is pathetic to realise that many parents cannot fluently speak their own indigenous languages. A study done in Taiwan showed that some parents did not teach their children to speak

the indigenous languages and this forced the grandparents to learn Mandarin so that they would be able to speak to their grandchildren (Hung 2013). The important point being raised here is that communities and families are the key stakeholders in transmitting and preserving indigenous languages. Studies have found that many children lack the support of their parents in learning their indigenous languages (Pawan 2004; Huang 2009; Hung 2006). The argument is that many parents believe that if their children speak the indigenous languages, it will negatively affect their academic achievement and access to economic opportunities.

Cost of Developing Local Languages

Economic factors tend to be the most obvious driving forces behind many countries that have opted for English as the official language. Countries seeking economic development often turn to English as a means to engage foreign markets. African countries wishing to attract foreign investments develop international trade opportunities and create tourism campaigns, often see English as an essential tool (Negash 2011). Namibia for instance has adopted English as its official language based on several factors of which feasibility is one. This included weighing in without carrying out an empirical study (UNICEF 2016), on the cost and effort involved in promoting a language to official status, and the availability of necessary resources for implementation, including books, learning materials, teachers, trainers, and training facilities (Frydman 2011; Gordon 2005). All of the languages except the indigenous languages were determined to satisfy this criterion. The indigenous languages were grounded in the view that it would be too costly to prepare resources and materials in those languages (United Nations Institute for Namibia (UNIN 1981 in Frydman 2011)). This view neglects the fact that the indigenous languages were already known to and used by the population, whereas while resources in English may have been more available or less costly to produce, English was largely unknown to the nation. Many critics have furthermore retorted with explanations of cost-benefit analysis that this view is short-sighted and antithetical to national development (Pütz 1995 in Frydman 2011). If local languages continue to be marginalised they will soon be lost. The costs of language loss are inestimable. That is, there is of course, no monetary value that can be put on language loss. The cost of developing local languages cannot be compared with the cost of nurturing a society that cannot work towards its own development. Countries, in particular African countries, should therefore redress linguistic hierarchies entrenched in language policies which result in social, cultural, and economic inequities between different language groups.

Indigenous Languages Not Clearly Documented

In acknowledging multilingualism, Woolman (2001) noted that it is difficult to consider the more than 400 indigenous languages in Nigeria as instructional tongues, arguing that most of them lack the written orthography, hence, material production becomes very difficult. Thus, the multiplicity of indigenous languages is a huge stumbling block on its own, especially considering that most of them are not documented (Jibir-Daura 2014). Olagbaju's (2014) study indicated that teachers encountered difficulties in getting adequate material and content in the indigenous languages. In this view, the starting point would be to ensure that the indigenous languages and the teacher training institutions are designed to adequately equip the teachers with the capacity to teach in indigenous languages. This stance challenges the growing trend towards the use of humanoid robotic teachers who, because of their nature, may be incapable of effectively teaching indigenous languages to African children.

Olafia (2014) maintain that the loss of most of these indigenous languages is because they are not clearly documented, hence, they cannot be preserved. In view of this, Olafia (2014) highlighted the critical role that libraries can play in documenting, developing and preserving the endangered languages. Ani (2012) argues this can be achieved by writing, audio-visual recording of stories, religious texts and songs. This also implies that people should be encouraged to write books in various indigenous languages. Talking about this, perhaps it is essential to also touch on the role of higher learning institutions in supporting the indigenous languages agenda.

Institutions of Higher Learning, the Development and Empowerment of Indigenous Languages

As the reservoirs of knowledge, the academia should be exemplary in speaking passionately about the plight of the dying indigenous languages. Unfortunately, the same advocates seem to be instrumental in extinguishing these languages. The South African Constitution (Act 108 of 1996, section 6) and various legislative pieces (e.g. Language-in Education Policy 1997; National Plan for Higher Education in South Africa 2001; Language Policy for Higher Education 2002) stipulate the need to preserve and resuscitate the use of indigenous languages. In this view, the South African universities are obliged to positively respond to these legislations, particularly the Language Policy for Higher Education policy objective which highlights the need to create "a multilingual environment in which all our languages are developed as academic/scientific languages [...] minimising barriers to access and success in higher education" (LPHE 2002 :4-5). Amongst the many institutions of higher learning in the country, UNISA has been applauded for immensely contributing

towards the development and empowerment of the previously marginalised indigenous languages, by teaching nine of the thirteen official languages of the country (Madiba 2010; Beukes 2010; Balfour 2007; Nkuna 2015).

Discussion

Evidently, language plays a significant role in all aspects of development. It is a mechanism through which knowledge can be imparted (Olaoye 2013). The use of unfamiliar language in the process of learning, for economic opportunities and even accessing health care services can present itself as a barrier to development. The use of foreign languages as media of instruction disadvantages not only the learners but also the community and erects barriers between school and community participation. Equally, the language of assessing students must be taken into consideration. The current assessment tools that learners are tested with fail to take into consideration their environment and (in) experience. Thus, those proficient in their mother tongue but not in English are lost through the sieve of English language assessment. The argument here is that there is need for the decolonisation of the assessment systems, so that indigenous languages are also used for assessment. In this view, Kaschula (2013: 5) is mindful to say that: “We need intersection and not opposition...It is not a case of increasing the visibility of other languages and decreasing that of English. It is about developing and promoting some languages in order to create an appropriate multilingual and effective cognitive and intellectual environment”.

Therefore, African governments should look into this state of affairs in pursuing their language and national development policies, so as to utilise individuals in society and save them from perniciousness. Mutasa, in his research on South Africa’s language policy states:

The people do not see much value in African languages ...? Authorities seem to be reluctant to ensure that African languages, by appropriate legal provisions, assume their rightful role as of official communication in public affairs, administrative and educational domains. No one seems to take African languages seriously. They seem to have nothing to offer except in everyday communication between members of families and informal conversation with friends and colleagues (Mutasa 2003: 6).

Despite many institutions advocating for the development and use of the previously disadvantaged indigenous languages, there has been limited success in terms of implementation. In South Africa, for instance, tertiary institutions have been encouraged to ensure access to knowledge by all students, making the non-African language speakers learning an African language. Critiquing the

South African language policy in this regard, Banda (2009) noted that this was just used as a kind of multi-competence, whereby students could just learn to get their messages across without really fully developing the linguistic codes. It has also been noted that despite most of the universities having language policies, very few of them have active implementation plans in place. In this regard: “language policies in Africa are characterised by lack of ‘political will to drive the process’ and thus ‘much lip service has been paid to the implementation processes’ to little effect” (Kaschula 2004: 11).

It has been indicated in this chapter, that higher education learning institutions have a role to play in the revitalisation of indigenous languages. Unfortunately, it can be argued that institutions of higher learning are part of the problem. Madiba (2013) noted that the intention of most universities to commit to this call mainly focuses on developing indigenous languages for teaching and learning. Madiba argues that this approach is in itself problematic because languages develop by being used and to ensure their effectiveness, the languages should be used as the principal media of instruction. Essentially, the fact that most institutions teach the indigenous languages in a foreign language (English) shows a lack of commitment and undermines indigenous languages. This means that tertiary institutions still have to do more in this transformation. Thus, Kaschula (2013: 23) argues:

Academics need to be language activists in order to ensure that we continue to champion a quiet language revolution, creating spaces for all languages at South African universities, and African languages in particular. The road to multilingualism is indeed a forked one – it is vitally important that the appropriate fork in the road be taken in order to truly transform the continent to educationally serve all of its peoples.

In emphasising the essence of linguistic citizenship, Stroud (2001: 339) highlights that: “...mother-tongue programmes and policies seldom deliver what they promise, and in fact, with respect to stated goals and ideologies (cognitive enhancement, language maintenance, etc.) often must be classed as downright failures”.

One of the causes of the above is our attitude as speakers of the indigenous languages. There tends to be a disconnection between our values and our actions. For instance, most parents are failing the role model test by sending their children to foreign language schools, arguing that indigenous languages are not valued in the socio-economic markets and will therefore decrease their chances of employment opportunities (Trudell & Piper 2014). In the same way, the declining student enrolment in the disciplines of African languages in universities is a cause for concern. So, if we shun our own languages and

consider them as of little value in the broader market, then chances are that even the non- speakers of those languages will not commit themselves to them (Stroud 2001). In this way, we have become our own enemies and it is high time we decolonise our minds and deal with the African attitudes and mind sets by starting to use our own indigenous languages.

Regarding the role of the media, we are of the view that there is an urgent need to re-appraise the role of media amongst African countries and to restructure them so, as to operate within the social context of the society. Media in indigenous languages should epitomise a people-oriented communication approach to programs of national development and preservation of socio-cultural values. Communities will not take ownership of projects that they cannot relate to or that do not fit into their meaning-giving context. It is the context that communities can confidently associate with projects designed to improve their living conditions. Communities should be exposed to local languages through amongst others, the radio, television, computer, cell phones and print media. Governments need to revisit the existing language policies to align them with the meaning-giving context of the various indigenous language communities and evaluate if the policies are indeed of benefit to the local communities.

Conclusion

The need to close the human development gap cannot be overemphasised and to achieve this, human development arguably has to be sustained and sustainable (UNDP 2016). To ensure that human development is sustained and sustainable requires among other things, a culture sensitive approach to human development. As alluded to earlier on in this chapter, language is at the centre of culture; it is the carrier of culture and therefore must be taken into consideration in development processes. Brauthiaux (2002) is of the view that professionals, involved in development acts, must recognise the hegemony of English in the process of development and therefore must reflect on their role in perpetuating inequalities associated with the use of English as a language of development. The continued use of English in development processes marginalises and excludes, from the development processes, those who do not speak English. We have argued that development must take place in the context of human rights. Development and human rights are indivisible, in that both aim to promote the well-being and freedom, based on the inherent dignity (UN 2011b) and equality of all people.

In closing, we are not arguing that indigenous languages are the “saving grace” of development, but the fact is that they are the implements for accelerating advancement and positive transition, as they can be widely accepted

in the facilitation of social opportunities to those who speak the marginalised languages. The point therefore is that, it is high time we arrest the negative perceptions about indigenous languages; it is high time we revive our subordinated, endangered and dying languages; it is high time we embrace them before they get extinct, because losing one's language implies losing one's heritage, culture and identity. Thus, the relevance of policy making bodies, in documenting, developing and preserving indigenous languages cannot be overemphasised.

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Towards the Establishment of Robust Financial Market Laws? An appraisal of the Decolonisation of “Investments” in Zimbabwe

Howard Chitimira

Introduction

A lot still needs to be done to develop and adopt robust legislative “investment” policies that promote competitive and viable financial markets in Zimbabwe (World Bank 2017: 1-47). This follows, *inter alia*, the fact that Zimbabwe has been employing very poor, incompatible and inflexible macroeconomic and socio-economic policies that were directly borrowed from some international institutions, especially, the Bretton Woods institutions that comprises the World Bank and the International Monetary Fund (IMF), since the late 1990s to date (Nyarota *et al* 2015: 29-33; World Bank 2017: 14). Moreover, this *status quo* has been exacerbated by the socio-economic and political instability experienced in Zimbabwe, since the late 1990s to date (World Bank 2017: 14). This socio-economic and political instability could have been directly or indirectly influenced by the adoption of incompatible and inflexible macroeconomic and socio-economic policies from the Bretton Woods institutions in Zimbabwe. These and other factors have negatively affected socio-economic development, “investments” by Zimbabwean individuals and juristic persons in other countries and foreign direct investment (FDI) in Zimbabwe (Nyarota *et al* 2015: 29-33). For instance, the Zimbabwean economy has been declining as early as the late 1980s. In this regard, a severe economic decline that occurred in the early 1990s after the launch of the controversial and neoliberal Economic and Structural Adjustment Program (ESAP) policy in Zimbabwe in 1990 is a case in point for Zimbabwe (Nyarota *et al* 2015: 29-33). It is submitted that the adoption of this policy by the Zimbabwean government from the Bretton Woods institutions was ill-advised since it was very poor and incompatible with the prevailing Zimbabwean economic dispensation at the time of its launch. Furthermore, the Zimbabwean government’s introduction and subsequent implementation of ESAP was informed by proposals from the World Bank and IMF (Ramsamy 2006: 515-523). Additionally, apart from the ESAP policy, various factors have also equally contributed to the economic decline in Zimbabwe. For instance, other contributory factors include the adoption of

poor micro and macro-economic policies; enactment of irrelevant “investment” laws; poor regulation of the financial markets; adoption of poor economic development and FDI policies as well as failure to implement the indigenisation policy (Nyarota *et al* 2015: 29-33). Moreover, the adoption of inflexible and incompatible socio-economic and FDI policies that are inconsistently enforced by the government and other relevant authorities have somewhat enabled foreign “investors” to exploit minerals and other natural resources and make huge profits without contributing meaningfully to the development of the relevant local communities in Zimbabwe (Hollaway 1997: 27-28; Chindori-Chininga 2012: 8-9; Murombo 2016: 230–263). The recent exploitation of diamonds by dubious and incompetent foreign mining companies in Marange (Chiadzwa) diamond fields since 2006 to date is a case in point (Centre for Research and Development 2014: 6). Thus, from an African development perspective, Zimbabwe and other African countries must carefully formulate FDI policies that promote sustainable economic development to curb poverty in Africa (African Union Commission Economic Affairs Department Draft Pan-African Investment Code, December 2016: articles 1-52). Given this background, the author investigates whether Zimbabwe’s “investment” and financial markets regulatory framework is robust enough to enhance intra-African “investments”, sound economic empowerment of all relevant persons and positive economic growth of its Gross Domestic Product (GDP). Accordingly, the regulatory enforcement flaws and other related challenges affecting the Zimbabwean “investment” laws and financial markets regulation are discussed. To this end, the strength and weaknesses of relevant legislation such as the Securities Act 17 of 2004 [Chapter 24:25] as amended (Securities Act 2004), the Collective Investment Schemes Act 25 of 1997 [Chapter 24:19] as amended (Investment Schemes Act), the Asset Management Act 15 of 2004 [Chapter 24:26] as amended (Asset Management Act), the Zimbabwe Investment Authority Act 4 of 2006 [Chapter 14:30] as amended (Investment Authority Act) and the Indigenisation and Economic Empowerment Act 14 of 2007 [Chapter 14:33] as amended (Indigenisation Act) in relation to financial markets regulation and the promotion of FDI in Zimbabwe are examined. Furthermore, possible measures that could be employed to ensure that there is a plausible balance between the promotion of local people’s business investments (the indigenisation policy) and the attraction of FDI in Zimbabwe are provided.

“Investment” Policies and the Regulation of Financial Markets in Zimbabwe Prior to 1980

Investment policies prior to 1980

For the purposes of this sub-heading, pre-colonial “investment” policies that were adopted in Zimbabwe between 1000 and 1890 are not discussed. Only investment policies between 1890 and 1980 are discussed.

The British led by Cecil John Rhodes arrived in Zimbabwe in the 1880s. In about 1888, Mr Rhodes colonised Zimbabwe through his British South Africa Company (BSAC) and established its colonial capital at Fort Salisbury which is now called Harare (Dube 2013: 10-12). Thereafter, a new country called Rhodesia was formed in about 1895 and later changed to Southern Rhodesia in about 1898. Mr Rhodes fraudulently acquired farmland “investments” and mining rights from King Lobengula and was later granted a royal charter by the British government to control Matabeleland and other parts of Southern Rhodesia (Dube 2013: 10-12; Hollaway 1997: 27).

After Cecil John Rhodes and at about 1895, Rhodesia was a full colony of the British government. Nonetheless, Mr Rhodes’ BSAC administration only ended in about 1922. Thereafter, several British leaders were appointed by the British government to rule over Rhodesia. Various colonial “investment” policies were adopted by the Rhodesian government, especially, during the Ian Smith regime. Put differently, a number of draconian “investment” policies were adopted by the Rhodesian White minority government between 1922 and 1980 (Dube 2013: 10-12). These policies were largely aimed at empowering the White minority people socially, politically and economically. Moreover, the aforesaid policies were also adopted by the Rhodesian government to segregate the majority of the Black people from the available fertile land and socio-economic activities of the country (Dube 2013: 10-12; Hollaway 1997: 27). Accordingly, political oppression, repressive laws and other extra judicial methods were employed to entrench and enforce “investment” policies that largely benefited the White people at the expense of the native Black people who were merely treated as servants and/or cheap labourers in several Rhodesian White-owned farms, companies and business “investments” (Dube 2013: 10-12; Hollaway 1997: 27). Most of the European and American companies and business “investments” that were established in Rhodesia between 1922 and 1980 promoted and protected the colonial socio-economic and political interests of the White minority at the expense of the native Black people (Dube 2013: 10-12; Hollaway 1997: 2). Consequently, native Black majority people did not have access to, and/or control over their country’s land-related “investments” and natural resources (Dube 2013: 10-12; Hollaway 1997: 27). For instance, most mining “investments” involving natural resources, especially, gold and iron were

merely established for profit and colonial territorial gain for the White minority at the expense of local Black communities (Hollaway 1997: 27; Kaseke, Chaminuka and Musingafi 2015: 90-92). This culminated into a number of illegal extractions of minerals by the companies that “invested” in mining and other related persons that were controlled and/or affiliated to the Rhodesian government without adopting appropriate “investment” and corporate social responsibility (CSR) policies to develop and adequately empower the relevant affected Black communities. As a result, Black communities were neglected by the government and mining companies which failed to adopt appropriate and impartial “investment” policies to promote socio-economic and infrastructural development of such communities (Kaseke, Chaminuka and Musingafi 2015: 90-92). It appears that the Rhodesian government’s “investment” policies were merely influenced by greed, exploitation and segregation of Black people from the economic activities of the country (Hollaway 1997: 28). For instance, the native Black people had restricted access to education, health and socio-economic services from the Rhodesian government. This literally means that about 75 per cent of the Black people who were relegated to poor farming communal lands during the colonial era were also excluded from the “investments” and other socio-economic activities of the country.

The regulation of financial markets in Zimbabwe prior to 1980

Most Black people were excluded from the main economic and financial markets activities of the country by the colonial government, especially, between 1895 and 1980 (Harvey 1996: 1-28). As indicated above, majority of the Black communities were forced to live in the rural areas by the colonial government, particularly between 1922 and 1980, with limited or no chance to play a major role in the economic development, “investments” and financial activities that were conducted on the financial markets (Dube 2013: 10-12). During this period, no clear financial markets laws and liberal financial markets policies were adopted by the Rhodesian government. Nonetheless, about three regional stock exchanges provided finance for mining companies in 1895 before they were shut down in 1924.

The entire financial sector was influenced by the British government and commercial banks were largely owned by foreign companies from Europe and America. Thus, the Rhodesian financial sector was relatively more developed than that of other countries in Africa. For instance, Rhodesia had some financial markets and institutions that were established prior to the 1960s (Harvey 1996: 3-4). Moreover, the Rhodesia Stock Exchange (RSE) commenced its operations as early as 1946. In relation to this, about thirteen brokers were granted operating licences and about 98 shares were traded on the stock exchange in 1963 (Harvey 1996: 3). Attempts to regulate financial markets were introduced

through the 1952 Treasury Bills which were, *inter alia*, aimed at empowering banks to acquire local liquid assets (Harvey 1996: 3). Moreover, the Rhodesia Stock Exchange Act was enacted in 1974 in another bid to effectively regulate the trading of securities and financial instruments in the Rhodesian financial markets (Karekwaivenani 2003: 9-34).

The Bank of England was very instrumental in the establishment of the Rhodesian central bank, which became operative in 1956. The central bank was introduced to promote greater monetary autonomy and proper regulation of foreign exchange trading platforms in Rhodesia (Sowelem 1967: 30). About two accepting houses were established in 1956 and two discount houses were later introduced in 1959 in a bid to enhance the regulation of the local stock exchanges and other related financial institutions (Harvey 1996: 3-4). However, it is not clear whether both the accepting houses and discount houses were empowered to adopt their own policies to combat illicit practices such as market abuse and other related financial crimes in the Rhodesian financial “markets”. In 1963, the central bank of Rhodesia and Nyasaland was renamed the Reserve Bank of Rhodesia and commercial bank lending relatively improved by two per cent of the total GDP in the same year. Nonetheless, the overall regulation of the financial markets and the combating of illicit trading activities in such markets remained flawed and inadequate despite the Rhodesian government’s adoption of stringent exchange controls that were mainly aimed at protecting local White “investors” (Harvey 1996: 3-4).

“Investment” Policies and the Regulation of Financial Markets in Zimbabwe Subsequent to 1980

Investment policies subsequent to 1980

Rhodesia was renamed Zimbabwe after independence on 18 April 1980. Nonetheless, the Robert Mugabe government inherited most of the Rhodesian government’s opaque “investment” policies (Nhavira *et al* 2013: 3). For instance, most “investment” policies that were adopted by the Zimbabwe government protected foreign “investors” at the expense of local investors. As a result, most of the key sectors of the economy such as mining, agriculture, manufacturing and finance (including commercial banks) were controlled by European and American companies (Nhavira *et al* 2013: 3). While this approach attracted some FDI to Zimbabwe mostly from the European and American companies between 1980 and 2000, it did not provide adequate support to local investors in the same way as it did to foreign “investors”. Local industries were too marginalised and very little government support was given to such industries. This *status quo* was exacerbated by the Zimbabwean government’s adoption of irrelevant economic “investment” policies such as the ESAP in the early 1990s

(Nyarota *et al* 2015: 29-33). Bretton Woods institutions inspired ESAP was adopted by the government in a bid to enhance the implementation of financial reforms through various economic liberalisation and deregulation strategies. The purported rationale for this approach was to, *inter alia*, encourage all persons to competitively engage in the banking sector and increase innovation, quality of service, efficiency and more “investments” in the Zimbabwean economy (Nhavira *et al* 2013: 3-4). Consequently, the Reserve Bank of Zimbabwe (RBZ) issued out new banking and finance licences to a number of banks between 1993 and 2003. The number of banks increased from 21 to 41 between 1990 and 2003. Nonetheless, these World Bank and IMF inspired ESAP financial reforms culminated into a huge collapse of the financial sector with a number of banking institutions either being liquidated or shutdown indefinitely between 1990 and 1998. The collapse of Mr Roger Boka’s United Merchant Bank in 1998 is good example in this regard (Nhavira *et al* 2013: 3-4).

The major collapse of the banks, companies and other financial institutions between 1990 and 2000 was clear indication that ESAP was a failure in Zimbabwe. ESAP also contributed to the negative economic growth, poor FDI and poor “investment” policies to be employed in Zimbabwe between 2000 and 2010. Thus, the so-called liberalisation policies were not very successful in Zimbabwe during the aforesaid period. Consequently, various changes were introduced by the government to try and balance between foreign and domestic shareholding in the financial institutions and other key sectors of the Zimbabwean economy. For instance, more stringent foreign currency controls were adopted and licenses were now issued to foreign banks only where necessary. Moreover, the Banking Act [Chapter 24:20] (Banking Act) was amended in 2000 to enable local banking institutions to get licences easily and convert into commercial banks (Nhavira *et al* 2013: 3-4). Nevertheless, these changes and the so-called deregulation of the financial services industry did not give rise to more “investments” in the Zimbabwean economy (Nhavira *et al* 2013: 3-4). Put differently, although the Zimbabwe Investment Centre (ZIC) was established as an independent clearing agency responsible for promoting FDI in Zimbabwe as early as 1989, various uncertainties regarding “investing” in the Zimbabwean markets have remained unresolved. For example, a total of only US\$2 567.4 million FDI was received in Zimbabwe between 1997 and 1998 from the United Kingdom (UK), the United States of America (USA), Ireland and Germany (United Nations Environment Programme 2000: 10). Consequently, Zimbabwe continued to face political and economic challenges which made it almost impossible to attract any viable “investments” from other countries (Nhavira *et al* 2013: 3-4). Most “investors” continued to shun African countries that had opaque and rigid “investment” laws such as Zimbabwe. As a result, Zimbabwe was reportedly considered as one of the least “business-

friendly” countries by the United Nations Conference on Trade and Development survey of African “investment” promotion agencies in 1999 (United Nations Environment Programme 2000: 10; United Nations Conference on Trade and Development 1999: 45-52). This negative trend continued and the mining sector was the most affected between 2000 and 2010 (Nyamunda and Mukwambo 2012:145-166; Gwimbia and Nhamo 2016: 10-21; Murombo 2010: 570-588; Murombo 2013: 33-49; Chindori-Chininga 2012: 7-22; Saurombe 2014: 7-14). Political instability coupled with poor “investment” policies gave rise to low FDI and most companies as well as industries in Zimbabwe were forced to shut down (United Nations Environment Programme 2000: 10).

As indicated above, the introduction of ESAP between 1991 and 1995 failed to attract more FDI. Consequently, the government was forced to formulate and adopt a number of other alternative economic and “investment” policies aimed at attracting FDI and reviving the economy. For instance, the Zimbabwe Programme of Economic and Social Transformation (ZPEST) was introduced in 1997 while the National Economic Recovery Plan was adopted in 2003. Nevertheless, these efforts did not yield any success since Zimbabwe could no longer afford to borrow and/or pay back the debt that it supposedly owed to the IMF and the World Bank. Accordingly, the government further introduced the Macro-Economic Policy Framework in 2005 as well as the Short Term Economic Recovery Plan in 2009 (Nyarota *et al* 2015: 3). These policies were also not successfully utilised. In this regard, it is submitted that Zimbabwe should not have adopted neoliberal economic policies from the IMF and the World Bank. Put differently, Zimbabwe and other African countries should not merely take whatever is proposed as an international standard or best practice by the Eurocentric international community and/or the so-called Bretton Woods Institutions.

Thereafter, the Indigenisation Act was enacted in 2007 in an attempt to encourage local people to participate in the main economic activities of the country. This Act provided that at least 51% of the shares of every public company and any other business must be owned by indigenous people of Zimbabwe who were previously discriminated and unfairly disadvantaged by the Rhodesian government (s 3(1)(a)). Interestingly, the 51% equity share ownership threshold has since been revised through the amendment of the Indigenisation Act in 2018 after relentless pressure from the World Bank, the IMF and international community. This could suggest that Zimbabwe is once again merely following economic policies from the Bretton Woods Institutions. The adoption of neoliberal policies from these institutions is likely to keep Zimbabwe in its economic doldrums for a longer period. The government also adopted a multicurrency policy in 2009 in another attempt to curb the negative

economic growth that was being experienced in most key Zimbabwean industries (Harvey 1996: 3-4). This status *quo* was influenced in part by political challenges, poor governance, hyperinflation and economic sanctions that were imposed on Zimbabwe by the Eurocentric international community prompting its further isolation by the Bretton Woods Institutions.

The government also introduced the Short Term Emergency Recovery Program (STERP) in 2009 to try and curb hyperinflation and enhance its macroeconomic policies. The STERP policy relatively improved the economy and the Zimbabwean GDP increased by about 9.6% in 2010. Thereafter, the Medium Term Plan (MTP) was introduced by government between 2010 and 2015. The MTP introduced a national development framework from mid-2010 to mid-2013 (United Nations 2014: 9-11). The MTP became the main economic and social policy document targeted at, *inter alia*, promoting macro-economic stability and economic transformation in Zimbabwe. Despite this, the Zimbabwean GDP was reduced by about 50.3% due to hyperinflation and about 10% of the industries were no longer having the capacity to operate optimally between 2008 and 2011. Very minimal FDI was received, the economy became largely informal, severe foreign currency shortages and lack of funding from the Bretton Woods Institutions worsened the economic challenges in Zimbabwe since 2010 to date (United Nations 2014: 9-11). Accordingly, the Zimbabwe Agenda for Sustainable Socio-economic Transformation (ZIMASSET) was adopted by the government in 2013. ZIMASSET is currently targeted at economic revival. However, ZIMASSET has not been successfully implemented to combat the ongoing “investment” and economic challenges in Zimbabwe. Thus, as discussed above, although the government came up with various economic reforms and blue prints aimed at fostering sustainable economic growth, these have not been very successfully enforced to date. This is caused by the ongoing political and economic challenges in Zimbabwe. These challenges are also exacerbated by the neoliberal nature of the Bretton Woods Institutions and the isolation of Zimbabwe by the Eurocentric international community in respect thereof.

The regulation of financial markets in Zimbabwe subsequent to 1980

The Zimbabwean financial markets regulatory framework has come a long way. Various financial and “investment” related laws have been enacted in Zimbabwe to date. For instance, the Exchange Control Act [Chapter 22:05] as amended (Exchange Control Act) was enacted in 1965 and first amended in 2001. This Act prohibits all persons from, *inter alia*, making any statement or producing any document in relation to the export and import exchange rules and trading of goods and/or services which is materially false or misleading (s 5 read with ss 4 and 8). The Exchange Control Act also prohibits any person

exercising any functions under this Act from using any information which he or she obtained while exercising such functions, for his or her personal gain (s 9). This Act was further amended in line with the Southern African Development Community (SADC) and the IMF recommendations. Nonetheless, these amendments did not improve foreign currency conversions, transfers and other relevant transactions in the Zimbabwean financial markets (United States of America 2015: 6). Thus, despite some reforms which were introduced in 2009, it remained very difficult for companies and other “investors” to obtain foreign currency and conclude their transactions in the Zimbabwean financial markets.

Moreover, the Companies Act [Chapter 24:03] as amended (Companies Act) was introduced in Rhodesia and later adopted in Zimbabwe. This Act was initially enacted in 1951 and first amended in 1953. The Companies Act has been amended several times and continued to be employed after independence in Zimbabwe. The Companies Act deals, among other things, with the registration of all companies (including foreign companies) and the issuing of shares and debentures (ss 21-123 and ss 199-337). This Act also prohibits any falsification of books and the making or publication of false statements by company directors and other related persons (ss 341; 343 and 345). The Companies Act also provides that any person convicted of an offence in connection with the promotion, formation or management of a company or the winding up or judicial management of a company and/or any fraudulent persons are prohibited from managing companies in Zimbabwe (s 344). Despite this, the Companies Act does not expressly prohibit market abuse and other related illicit trading practices in the Zimbabwean financial markets. The Zimbabwe Stock Exchange Act [Chapter 24: 18] as amended (Stock Exchange Act) was initially enacted in 1973 and has been amended several times and continued to be utilised in Zimbabwe after 1980. The Stock Exchange Act replaced the Rhodesia Stock Exchange Act which regulated the RSE before it was later repealed by the Securities Act 2004. In this regard, it is crucial to note that the first stock exchange was established in Bulawayo after the arrival of the Pioneer Column in 1896. Thereafter, the RSE commenced its proper functions between 1946 and 1952 (Karekwaivenani 2003: 9-34). The Stock Exchange Act regulated stock broking transactions, the listing of securities and/or financial instruments and related activities that were conducted on the Zimbabwe Stock Exchange (ZSE) (ss 22-62). The Stock Exchange Act prohibited unregistered stockbrokers from advertising, canvassing and/or advertising for business without the approval from the ZSE Committee (s 70). This Act also prohibited any person from making or publishing misleading circulars, reports, forecasts or statements regarding listed securities, financial instruments or other transactions that were conducted on the ZSE (s 71). The Stock Exchange Act further prohibited stockbrokers from issuing any circular,

report, forecast or statement in writing or otherwise regarding listed securities without prior permission from the ZSE Committee (s 72). The Stock Exchange Act also outlawed the making or causing of fraudulent acts and other misleading business activities on the ZSE (s 73). Over and above, the Stock Exchange Act discouraged any person from using certain words such as “stock exchange” and “stockbroker” without prior consent of the Registrar of the Stock Exchange (s 74). However, notwithstanding these restrictions, it remained very difficult for market participants to conduct their duties on the ZSE. The Zimbabwean financial markets have continued to be illiquid and unattractive to investors since the late 1990s to date.

The Banking Act was enacted in 1999 and has been amended several times to date. This Act regulates the registration of banking institutions and prohibits any unregistered institutions from offering banking activities or services to the public in Zimbabwe (ss 5-15). The Banking Act also regulates the conduct and activities of banking institutions in Zimbabwe (ss 16-72). Accordingly, the Banking Act prohibits all persons from making any statement that is materially and objectively false or misleading in relation to the operations or any activities that are carried out in accordance with this Act (s 75(1)). Likewise, any person who destroys, mutilates, alters or falsifies any book, paper or security belonging to, or relating to a banking institution; or makes, or is a party to the making of a false or misleading entry in any register, book of account or other document belonging to, or relating to a banking institution with intent to defraud or deceive other people shall be guilty of an offence (s 75(2) of the Banking Act). The Banking Act does not provide any factors that could be considered by the courts to prove such intention on the part of the offenders. Nonetheless, the Banking Act prohibits employees of banking institutions, the Registrar of Banking Institutions and other relevant persons from disclosing any information which they acquired in the performance of their duties under this Act (s 76). The Banking Act further prohibits the unlawful use of confidential information relating to banking institutions’ services, customers or activities for personal gain by anyone privy to such information (s 77). While these provisions are welcome, more still needs to be done to enhance the registration, supervision and regulation of banking institutions and financial activities in Zimbabwe. Most “investors” have little confidence in the Zimbabwean banking institutions due to the current cash crises and the inadequate protection afforded to those who deposit monies in the relevant banks or “invest” their securities in the financial markets.

The Investment Schemes Act deals with collective “investment” schemes and related financial activities that are not covered by the Banking Act. This Act prohibits unregistered collective “investment” schemes from operating in Zimbabwe (s 5 read with ss 6-27). Despite this, various unlawful pyramid

financial schemes and Ponzi schemes are still rife in the Zimbabwean financial institutions and markets.

The Asset Management Act regulates asset management businesses in Zimbabwe. The rationale and purpose of this Act is to, *inter alia*, curb fraudulent “investment” and business activities by government officials, bogus foreign “investors” and other unscrupulous market participants in the Zimbabwean financial institutions and financial markets. For instance, the Asset Management Act provides that only fit and proper persons may conduct the business of asset management on behalf of the clients by “investing” in money markets instruments, property “investment” portfolios or related financial instruments on a regulated stock exchange (ss 2-3). This Act also provides that all asset managers must be registered and the Chief Executive Officer of the Securities and Exchange Commission of Zimbabwe (SECZ) must establish and maintain a register of asset managers (ss 5 and 6). In relation to this, any person who was declared insolvent and is un-rehabilitated or who made an assignment to, or arrangement or composition with his or her creditors is disqualified from appointment as an asset manager or officer of any asset management company (s 9(1) of the Asset Management Act). Likewise, any person convicted of theft, fraud, forgery, making a forged document, perjury, money-laundering or financing terrorist activities or any other offence is prohibited from appointment as an asset manager or as a principal officer of an asset manager (s 9(1) of the Asset Management Act). All past and present principal officers, asset managers and/or other employees of an asset management company are personally liable for all of the debts and any other liabilities of the asset management company if they knowingly conducted the business of that company with gross negligence or recklessly or with intent to defraud any person (s 11(1) of the Asset Management Act). While these provisions are welcome, they have at times not been effectively and consistently enforced to combat illicit financial activities such as financial pyramid schemes in the Zimbabwean financial institutions and markets.

The Investment Authority Act repealed the Zimbabwe Investment Centre Act [Chapter 24:16] and the Export Processing Zones Act [Chapter 14:07]. The rationale for the Investment Authority Act is mainly to enhance the promotion and co-ordination of “investments” in the Zimbabwean financial markets. Accordingly, the Zimbabwe Investment Authority (ZIA) and the Zimbabwe Investment Authority Board (ZIAB) were established by the Investment Authority Act in a bid to promote more investments in the Zimbabwean financial institutions and financial markets (ss 3-4). This Act empowers the ZIAB to establish an Investment Committee that reviews the “investment” applications from any prospective investors and oversees all the “investment” processes in Zimbabwe (s 6). In relation to this, it should be noted that the ZIA

is empowered to review applications for investment licences; plan or implement “investment” promotion strategies for the purpose of encouraging “investments” and to identify sectors of the economy with potential for “investment” so as to attract all persons to “invest” in the Zimbabwean financial institutions and financial markets (s 7 of the Investment Authority Act). The ZIA is further empowered to advise the relevant Minister on investment policy and all investment matters in Zimbabwe so as to enhance the development of the economy (s 7(i) and (j) of the Investment Authority Act). Nonetheless, corruption and limited government support has impeded the functions of the ZIA, the ZIAB and the effective enforcement of the Investment Authority Act to date. In this regard, the bogus mining tenders awarded to mining companies in Chiadzwa, the looting of diamonds and the recent alleged USD \$15 billion diamond mining revenue which reportedly went missing in 2017 is a case in point (for related comments, see Chindori-Chininga 2012: 7-22; Murombo 2016: 230–263; Nyamunda and Mukwambo 2012:145-166).

Recently, the Special Economic Zones Act [Chapter 14:34] 7 of 2016 (Economic Zones Act) was enacted to establish special economic zones in order to promote FDI in Zimbabwe. This Act established the Zimbabwe Special Economic Zones Authority (ZSEZA) and the Zimbabwe Special Economic Zones Board (ZSEZB) so as to effectively encourage investments in the Zimbabwean economy (ss 3-5). The Economic Zones Act prohibits any person from submitting false documents and/or information in relation to his or her investment licence application (s 49). Nevertheless, the ZSEZA has to date grappled to administer, control, and regulate all special economic zones in Zimbabwe in accordance with the Economic Zones Act (s 18(c)). It appears that the granting of investment licenses for investment in special economic zones is politicised and corruptly administered by the ZSEZA and this has resulted in scant investments to be obtained in Zimbabwe to date.

Furthermore, as discussed earlier, the Indigenisation Act was enacted to encourage previously discriminated and disadvantaged people of Zimbabwe to actively participate in all its national economic activities. Section 3(1)(a) of this Act is probably most significant in that it obliged investors to cede at least 51% of their shares in public companies and other business to indigenous people of Zimbabwe. However, this statutory ultimatum kept away most “investors” that could not satisfy or comply with section 3(1)(a) of the Indigenisation Act. This ultimatum was mainly targeted at foreign companies, especially, foreign mining companies and foreign banks. Consequently, it remains to be seen whether the gazetted amendments to confine the ceding of 51% threshold only to two minerals, namely diamonds and platinum and redefine the term “Zimbabwean” to include all its citizens, will be effectively enforced (Chinamasa 2017: 1-235, for related comments; s 42 of the Finance Act 1 of 2018 (Finance Act), which

introduced the stated amendments to the Indigenisation Act). The gazetted amendments rightly minimise the role of foreigners in the ownership and control of the Zimbabwean economy.

Lastly, the Securities Act 2004 was enacted to, *inter alia*, regulate the trading of securities and financial instruments on the Zimbabwean financial markets. The Securities Act 2004 repealed the Stock Exchange Act. Precisely, the Securities Act 2004 regulates the licensing of persons or market participants who trade in or manage securities on the ZSE. In relation to this, the Securities Act 2004 established central securities depositories to enhance the marketing, trading and transferring of any securities listed on the ZSE (ss 63-86). This Act also established the SECZ (s 3 read with ss 4-28). The SECZ is an independent regulatory board which has several powers and duties that are aimed at promoting high levels of investor protection and reducing systemic risks in the Zimbabwean financial markets (s 4(1)(a) and (b) of the Securities Act 2004). The SECZ is also obliged to combat market abuse and other related financial crimes in order to promote market integrity and public investor confidence in the Zimbabwean financial markets (s 4(1)(c) and (d) of the Securities Act 2004). Accordingly, the SECZ oversees the trading of securities on the ZSE to detect and curb market abuse (s 4(2)(a) of the Securities Act 2004). It also registers and supervises all regulated securities exchanges and market participants in Zimbabwe (s 4(2)(b) and (c) read with ss 29-67 of the Securities Act 2004). The Securities Act 2004 expressly prohibits illicit market abuse practices such as insider trading and market manipulation (ss 87-99). Market abuse offenders are liable for both criminal and civil penalties as stipulated in the Securities Act 2004 (ss 87-99). Nevertheless, these penalties are very minimal for deterrence purposes. Furthermore, other anti-market abuse measures such as administrative sanctions and whistle-blower immunity provisions are not provided in the Securities Act 2004.

The Adequacy of the Zimbabwean Financial Markets Regulatory Framework and “Investment” Policies Subsequent to 1980

As indicated in the previous sub-headings, various efforts have been introduced by the government from time to time to promote “investments” and proper functioning of the Zimbabwean financial markets. For instance, several laws, policies, strategies and approaches have been adopted in Zimbabwe since the early 1980s to date in a bid to promote FDI, a viable economy and efficient financial markets (see Munyedza 2011: 1-12). Nonetheless, these efforts have yielded very minimal positive results in Zimbabwe to date. This could have been exacerbated by corruption, adoption of incompatible “investment” and economic policies such as ESAP, ZPEST, STERP, MTP and ZIMASSET

which are sometimes not consistently enforced (World Bank 2017: 1-47). The formulation and adoption of poor micro and macro-economic policies has also contributed to the current economic crisis, cash shortages, illiquid financial markets and minimal FDI to be obtained in Zimbabwe (Munyedza 2011: 1-12; Kramarenko *et al* 2010: 1-62). The other reason could be that the Zimbabwean government erroneously adopted similar flawed laws, policies and enforcement approaches from the Rhodesian government after independence in 1980. For instance, the RBZ, the Commissioner of Insurance and Pension Funds and the ZSE replaced similar agencies which were responsible for regulating the Rhodesian capital markets prior to 1980 (Nhavira *et al* 2013: 3). In this regard, it is important to note that the Commissioner of Insurance was replaced by the Commissioner of Insurance and Pension Funds between 2000 and 2001. Likewise, the ZSE which was initially responsible for regulating the entire Zimbabwean financial services industry was replaced by SECZ which took over most of such functions through the enactment of the Securities Act 2004. Put differently, although some of these Rhodesian laws and policies that were transposed into the Zimbabwean “investment” and financial markets regulatory regime were relatively enforced consistently in the early 1990s, the integrity and public “investor” confidence in the Zimbabwean financial institutions and markets continued to decline to date. Several banks and other financial institutions that collapsed between the late 1990s and 2018 clearly shows that the Zimbabwean government was wrong to adopt some of the Rhodesian laws, regulatory approaches and policies on “investments” and financial markets regulation (Nhavira *et al* 2013: 3).

Furthermore, the viability and competitiveness of the Zimbabwean financial markets and economy has continued to decline from the early 1990s to date. For instance, Zimbabwe has constantly performed horribly against renowned “investments” and economy indicators such as the Global Competitiveness Index of the World Economic Forum, the World Governance Indicators of the World Bank, the Doing Business Report indicators of the World Bank and the Corruption Perception Index of the Transparency International (Kramarenko *et al* 2010: 34; United Nations Environment Programme 2000: 6-12). This was mainly caused by several factors such as high cost of doing business, the lack or minimal ease of doing business and poor access to basic infrastructure for business people and potential “investors” in Zimbabwe (Kramarenko *et al* 2010: 34; United Nations Environment Programme 2000: 6-12). In relation to this, it is submitted that the adoption of some Western and other international approaches from the World Bank and the IMF such as ESAP without conducting proper feasibility studies regarding the compatibility of such approaches to the Zimbabwean financial services industry regulatory framework

was a serious policy flaw on the part of the Zimbabwean government (Moyo 2001: 1-35).

Additionally, notwithstanding its flaws, the enactment of the Indigenisation Act was probably aimed at empowering and encouraging the Black majority to actively participate in the Zimbabwean economy. This could have been prompted by the need to redress the injustices of the Rhodesian colonial era which saw the Black majority being overlooked in most key sectors of the economy such as agriculture, mining, manufacturing, financial services and banking sectors. Be that as it may, the key provisions of the Indigenisation Act were corruptly and chaotically implemented in most instances. Additionally, the mere introduction of the Indigenisation Act and its controversial 51% equity share ownership threshold for indigenous persons that was chaotically enforced forced most foreign companies and “investors” to shun “investing” in the Zimbabwean financial markets and other key sectors of the economy. FDI to Zimbabwe was adversely reduced and its economic woes worsened. Most “investors” were forced to shun doing business in Zimbabwe probably because the chaotic enforcement of the Indigenisation Act somewhat affected their property rights (Gono 2009: 1-11). In other words, the failure on the part of the legislature to enact robust “investment” laws that adequately provides clear rules and policies on property rights to protect all “investors” reduced FDI in Zimbabwe. The adequate protection of property rights is key to the promotion of FDI and economic growth in Zimbabwe. Thus, although encouraging the Black majority to participate in the national economic activities is important, the government ought to have carefully enforced the Indigenisation Act in order to strike a balance between the promotion of FDI and the participation of Blacks in the stated activities (World Bank 2017: 12). The other option could have been to decolonise the Zimbabwean “investment” and economic policies to incorporate indigenous approaches to the enforcement of the Indigenisation Act while protecting property rights of all “investors”.

Zimbabwe also wrongly adopted a fragmented silo approach to the financial services and financial markets regulation which unfortunately caused serious information asymmetries and supervisory difficulties for the relevant regulatory bodies, particularly between the late 1990s and 2018 (Nhavira *et al* 2013: 22). This also prompted massive disparities in relation to the mining, agricultural farming and manufacturing “investments” in Zimbabwe. Therefore, Zimbabwe should seriously consider decolonising its “investment” and financial markets regulatory framework by introducing indigenous regulatory and “investment” measures in order to address the stated disparities.

The other option is for Zimbabwe not to blindly adopt Eurocentric regulatory approaches such as the single regulator model or the twin peaks model which are employed in jurisdictions such as the Netherlands, the United

Kingdom (UK), South Africa, Australia and Canada (Nhavira *et al* 2013: 22). Put differently, Zimbabwe should avoid adopting Eurocentric models to curb compatibility challenges that may arbitrarily empower foreign “investors” to loot its national resources back to their countries.

Moreover, the multi-currency and dollarisation policy has failed to stabilise the Zimbabwean economy. Consequently, the “investments” and economic growth in Zimbabwe have been grossly affected by its reliance on numerous Non-Performing Loans (NPL). These NPLs also crippled the liquidity of the Zimbabwean financial markets as indicated by the monetary policy statements of 2012 and 2013 as well as the budget statement of 2012 (Nhavira *et al* 2013: 22). Therefore, Zimbabwe should decolonise its “investment” and financial markets policies and laws so as to introduce its own regulatory measures that adequately promote FDI without allowing any person, especially foreign “investors” to arbitrarily loot minerals and other “investments” to their countries. If properly enforced, this could enhance portfolio “investments”, FDI and the integrity of the Zimbabwean financial markets (United States of America 2015: 13). Thus, notwithstanding the fact that the adoption of multi-currency policy has somewhat reduced macro-economic risks such as hyperinflation rates, Zimbabwe’s GDP continued to be negatively affected by huge external payment arrears incurred by the country as early as 1990 (Nyarota *et al* 2015: 18). Consequently, very few companies are currently listed on the ZSE. For instance, most of the manufacturing, financial services and mining companies which constituted about 53% of the foreign companies that were listed on the ZSE were later delisted and eventually started moving their business from Zimbabwe from the late 1990s to date. Furthermore, the ZSE has been underperforming as early as 1998. Its performance could have been, *inter alia*, worsened by the ongoing political instability and the government’s adoption of incompatible Eurocentric economic models such as ESAP which gave birth to several chaotic financial sector liberalisation policies of the 1990s. These models also brought high interest rates and poor financial services in Zimbabwe (Harvey 1996: 17). Moreover, the adoption and enforcement of incompatible Eurocentric regulatory approaches by the Zimbabwean government and its regulatory bodies contributes to the poor GDP of the entire country (United Nations Environment Programme 2000: 7-8). Additionally, the government’s initial poor reliance on the Marxist-Leninist socialist policy ideologies of governance in the early 1980s could have somewhat failed to achieve adequate economic and political stability in Zimbabwe (Harvey 1996: 4-5). In this regard, it is submitted that the lack of political will and failure of the government to adopt radical policies aimed at empowering majority of the Black people to actively participate in banking and other key finance sectors of the economy subsequent to 1980 was mainly influenced by its cautious desire to

retain commercial banks that were largely owned by the minority White people and other foreign “investors”. Likewise, between 1980 and 1999, the government could have cautiously decided not to effect radical transformation in agricultural farming land which was 88% owned by White farmers as well as the mining and manufacturing sectors which were 25% owned and controlled by the White people, in a bid to retain their “investments” in Zimbabwe (Harvey 1996: 6-7). Given this background, it is comprehensible why the government embarked on a fast track land reform programme and enacted the Indigenisation Act to primarily empower Black people of Zimbabwe. Regrettably, these purported good transformation and empowerment efforts were poorly enforced by the government of Zimbabwe. Accordingly, many “investors” were deterred to do business and “invest” in Zimbabwe. Consequently, it remains to be seen whether the government’s recently introduced special economic zones and amendments to the Indigenisation Act will effectively attract more “investors” to come and “invest” in Zimbabwe again (Zimbabwe Government 2018: 17).

Conclusion

Zimbabwe has commendably adopted several economic and financial markets-related “investment” policies and legislation subsequent to 1980. For instance, various economic and “investment” policies such as ESAP, ZPEST, STERP, MTP and ZIMASSET have been formulated and adopted to date. Moreover, numerous “investment” and financial markets-related legislation such as the Securities Act 2004, the Investment Schemes Act, the Asset Management Act, the Investment Authority Act, the Companies Act, the Banking Act, the Economic Zones Act and the Indigenisation Act have been enacted from time to time since 1980. Nevertheless, the success and intended outcomes of all these policies and legislation have been continuously marred by numerous flaws since 1980 to date. For instance, most of the Eurocentric economic, investment, financial services and financial markets policies, legislation and regulatory measures have been sometimes ineffectively employed in Zimbabwe, particularly from the early 1990s to date. Consequently, most of these policies and legislation failed resoundingly. The failure of economic and “investment” policies such as ESAP, ZPEST, STERP, MTP and ZIMASSET which were adopted between 1980 and 2018 is a case in point. Furthermore, selective application and inconsistent enforcement of key legislation such as the Securities Act 2004, the Investment Schemes Act, the Asset Management Act, the Investment Authority Act, the Companies Act, the Banking Act, the Economic Zones Act and the Indigenisation Act have also crippled FDI, GDP and economic growth of Zimbabwe since the early 1990s to date. These flaws

coupled with political instability and massive corruption on the part of government officials have negatively impeded “investments” and the growth of the Zimbabwean financial, manufacturing, agricultural and mining sectors since the early 1990s to date. In this regard, it is submitted that the government should decolonise its “investment”, economic and financial markets policies, legislation and related regulatory measures to attract more FDI in Zimbabwe. Precisely, ZIMASSET, the Securities Act 2004 and the Indigenisation Act should be carefully revised to empower all Zimbabweans to actively participate in key sectors of the economy without necessarily dissuading foreign persons from “investing” in Zimbabwe. This could be achieved by aligning ZIMASSET with the relevant legislation and ensuring that its enforcement is non-partisan and un-prejudicial towards all “investors” (United Nations 2014: 9-11). Moreover, the recent proposed amendments to the Indigenisation Act should be carefully utilised to empower all Zimbabweans without necessarily adopting Eurocentric enforcement approaches that could enable foreign “investors” to arbitrarily loot all profits, minerals and other “investments” to their countries (United States of America 2015: 3-4). The Securities Act 2004 should be further amended to empower the SECZ to utilise other anti-market abuse enforcement measures such as administrative sanctions and whistle-blower immunity provisions. This approach could help the SECZ and other regulatory authorities to develop free, orderly, reputable, competitive and efficient financial markets in Zimbabwe.

Zimbabwe should also consider decolonising all its periodical “investment” policy reviews under the Organisation for Economic Cooperation and Development (OECD), the World Trade Organisation (WTO) and/or the United Nations Conference on Trade and Development (UNCTAD) to incorporate its own policy considerations that are compatible to the Zimbabwean “investments”, economic needs and financial markets (United States of America 2015: 3-4). This approach could enable Zimbabwe to avoid blindly adopting policy suggestions from international bodies and other Eurocentric regulatory agencies. Furthermore, the stated decolonisation approach could also boost “investments” in Zimbabwe from both domestic and international “investors” (Moyo 2001: 1-5). Zimbabwe should also abandon its financial sector liberalisation policy since it has failed to increase FDI in the Zimbabwean financial services industry, financial markets and the economy at large since its inception in the early 1990s to date. Additionally, Zimbabwe should carefully formulate its annual monetary and fiscal policies to avoid high budgetary deficits and/or excessive borrowing so as to reduce high interest rates that are unfavourable to FDI and the growth of the GDP (Moyo 2001: 1-5). It is further submitted that Zimbabwe must formulate its own economic, investment and financial markets policies.

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Decolonising Investment Regimes for Development Purposes in Contemporary Africa

Talkmore Chidede

Introduction

Since the dawn of independence, African countries have signed bilateral investment treaties (BITs) with western capital-exporting (developed) nations (Graham 2014: 5). African countries signed BITs with the developed countries on the assumption that they would attract foreign direct investment (FDI) (United Nations Economic Commission for Africa [UNECA] 2016: 21; Graham 2014: 5). FDI was perceived as a tool to enhance their economic growth and development, inject capital into their financially stressed local industries, increase advanced technology and know-how and would also help to fight poverty and unemployment (Fox 2014: 229). Further, BITs were also concluded by African countries as economic diplomacy tools to foster better relations with other countries particularly industrialised countries (Salacuse & Sullivan 2005: 72), and as a tool “to deepen regional integration” (UNECA 2016: 21). The foregoing arguments are viable if one considers that immediately following independence, Africa’s founding fathers, in addition to achieving “complete independence of the African continent and total rejection of colonialism and exploitation in all its forms” (These sentiments were expressed by African leaders at the Fifth pan-African Congress held in Manchester, England in 1945. See also Article II of the Charter of the Organisation of the African Unity, 1963), were strongly determined to alleviate poverty and achieve economic growth and development across the continent (See, for example, the Lagos Plan of Action 1980 and New Partnership for Africa’s Development 2001).

However, despite African countries having signed a large bulk of BITs and having realised voluminous FDI inflows due to *inter alia* immense natural and human resources, the African continent has remained with poor economic growth and development, extreme poverty and high levels of unemployment (World Bank 2017). The reasons for Africa’s underdevelopment are numerous and include colonialism, political instability, poor and inappropriate policies, limited human capacity, and the workings of the international economic system (i.e. globalisation). Equally, bad governance has been identified as the most

important factor that holds back Africa's development. African leaders themselves have recently acknowledged that indeed bad governance in many countries has hampered development efforts). In fact, little has been proven about the role FDI has played in enhancing the much-needed social and economic development in the continent (Kaulihowa 2017; Cleeve, Debrah & Yiheyis 2015). It is beyond doubt that BITs and FDI have not produced the professed and intended results for Africa, and other developing nations across the world (Salacuse & Sullivan 2005: 72). Generally, the developmental dimension of FDI has been and is still debatable across the globe. If FDI had enhanced growth in Africa, the continent would have realised economic development and industrialisation by now. Does this mean Africa needs a new narrative of home grown investments? Most developing countries' governments in the world, including African nations are cancelling or renegotiating their traditional BITs with the intention to negotiate "investment" treaties that address their domestic development needs (United Nations Conference on Trade and Development [UNCTAD] 2015). For example, between 2013 and 2014, South Africa cancelled several of its BITs with European Union (EU) countries and Switzerland (Schlemmer 2015: 167; Lang 2013).

This chapter seeks to critique the viability of FDI to African countries. It first sets out a brief background of what constitutes FDI in both the historical and contemporary contexts. It then focuses on the role of FDI in development in general, before turning to the supposed role of FDI in the under-development of Africa. The chapter then offers some recommendations for African governments on how to rethink the use of FDI for development in Africa; that is to ensure that investments better the welfare of many African citizens.

Putting FDI in Historical and Present Context

FDI is a type of cross-border "investment" which is made by a resident entity in one economy (the direct "investor"), with the aim of establishing a lasting interest in an enterprise (the direct investment enterprise) being a resident in an economy other than that of the direct "investor" (Organisation for Economic Co-operation and Development [OECD] 2008: 17). Historically, FDI has been understood as the movement of capital from North to South "by multinational enterprises (MNEs) from industrial countries "investing" in developing countries, traditionally aiming to exploit natural resources in the latter or to substitute trade as a means to serve domestic consumption markets" (Qiang *et al* 2015). This explains why most of traditional investments in Africa are from developed western countries such as the United States (US) and the EU countries. In fact, the EU and the US are still the major trade and

“investment” partners of most African countries (UNCTAD 2018: 38). The paradigm has, however, shifted in contemporary international economic system. FDI no longer focuses on capital only but also technology and know-how, it is no longer from North to South but also from South to South, and from South to North (UNCTAD 2018). For instance, current trends reveal emerging frontiers of FDI sources from developing regions such as Asia (China, India and Singapore), Latin America and the Caribbean, as well as Africa (Angola, South Africa, and Nigeria) (UNCTAD 2017: 43). According to Qiang *et al* (2015), “FDI is no longer a substitute of trade, but quite the opposite. Today FDI has become part of the process of international production, by which “investors” locate in one country to produce a good or a service that is part of a broader global value chain (GVC). “Investors” then, have become traders and vice-versa”. Equally important, FDI is no longer carried by MNEs only, but also small to medium enterprises (SMEs) from developing countries that are “investing” in countries beyond their home countries. Also important to note is that “international patterns of production are leading to new forms of cross-border investment, in which foreign “investors” share their intangible assets such as know-how or brands in conjunction with local capital or tangible assets of domestic investors. This is the case of non-equity modes of investment (NEMs) – such as franchises, outsourcing, management contracts, contract farming or manufacturing” (Qiang *et al* 2015).

There are several variables that may influence FDI inflows. Notably, socio-economic factors (availability of natural resources, skilled labour, lower wage and taxes rates, quality transport and infrastructure, size of economy or potential for growth), political and legal factors (political stability, good governance, protection of property rights), among others. It is argued that some of the major reasons why Africa has been experiencing growing FDI inflows over time was due to the availability of natural and human resources, lower wage and tax rates (Asiedu 2013: 1; OECD 2002: 8). Surprisingly, political instability and corruption seemed not to have deterred FDI inflows in other African countries such Democratic Republic Congo and Angola (UNCTAD 2018: 38-41). I find that despite the prevalence of corruption and uncertain political situations, FDI inflows continued to surge in these countries in recent years. Legal certainty and predictability are among the factors that international businesses look at when deciding their “investment” destinations. In the past two decades, Zimbabwe’s legal uncertainty and political instability related to the corruption and lack of trust in key institutions, especially judiciary and the extent of law and order has been the major disincentive for “investment” into the country (Chidede 2016: 141).

In addition, four types of motives for FDI are identified: natural resource seeking, market seeking, efficiency seeking, and strategic asset seeking (Franco

et al 2008: 2330). Natural resource seeking FDI is motivated by the availability, price and quality of natural resources, infrastructure enabling resources to be exploited, “investment” incentives (Franco *et al* 2330). Market seeking FDI is inspired by factors such as *inter alia*, the size and growth of domestic markets and adjacent regional markets, availability and price of skilled and professional labour, quality of infrastructure, presence and competitiveness of related companies, macroeconomic policies pursued by host governments, promotional activities by regional or local development agencies (Franco *et al* 2331). Efficiency seeking FDI is aroused by production costs, “investment” incentives, the presence of agglomerative economies, human resource development, and availability of specialised clusters, environment which encourages competitiveness enhancing cooperation both within and between enterprises (Franco *et al* 2332). Strategic asset seeking FDI is induced by variables like the availability of knowledge-related assets and markets required to protect or enhance specific advantages of an enterprise, institutional framework influencing easiness of acquiring these assets by an “investing” firm (Franco *et al* 2333). It is also worth noting that decolonisation as a concept can influence the prevailing “investment” trends and discourses in Africa.

The Role of FDI in Development

For several decades, policy makers, politicians, scholars and academics have debated the role played by FDI in development. The debate has been marred by different ideologies, dogmas and evidence. A substantial body of literature by proponents of FDI advance the argument that FDI is a vehicle for economic growth and development, transfer of advanced technology and know-how and employment creation (OECD 2002). It is against this background that many countries specifically developing, emerging and countries in transition have prematurely liberalised their FDI regimes and pursued other “investment”-related policies with a view to attracting FDI (OECD 2002: 5). These models of “investment” reform were designed and promoted by neoliberal international financial institutions (so-called Bretton Woods) such as the International Monetary Fund and the World Bank in the name of creating a “business-friendly environment” (For example, the World Bank Doing Business Index ranks economies on their ease of doing business from 1–190, whereby a high ease of doing business ranking means the regulatory environment is more conducive to the starting and operation of a local firm. See also the World Bank Guidelines on the Treatment of Foreign Direct Investment [1992]). It is argued that these models have historically and contemporaneously produced extreme inequality and poverty in Africa (Nkomo 2013: 105; Devarajan *et al* 2001). Be that as it may, African leaders are still convinced that economic openness can be

beneficial for their countries. This continent-wide consensus on economic openness is reflected in the adoption of the African Continental Free Trade Area by African countries under the auspices of the African Union (UNECA 2018).

Ironically, the Bretton Woods Institutions had opposed and undermined African development plans or strategies (Ake 1996: 33; Mbaku 2004: 141). This made it difficult for the newly independent states to cut off the colonial umbilical cords and to pursue economic development independently, putting African states at the mercy of the caprices of donors and their development institutions – what has commonly been referred to as the “dependence syndrome” (Mhango 2017). Nevertheless, even though African countries followed the development paradigm advocated by the Bretton Woods Institutions, successive programmes that have been implemented in Africa since independence have failed to boost economic growth and socioeconomic development (Mbaku 2015: ch. 6). The lack of local manpower with adequate expertise and skills, especially in economics, has aggravated the crisis as most African countries have to rely on expatriates for their development plans.

In addition, there was a risk of lowering investment regulatory standards those by countries who were so keen to attract FDI, the so-called “race to the bottom” (Mehmet & Tavakoli 2003: 133-156). Many fear that mobility of capital induces a race to the bottom in international “investment” law as firms “invest” in the countries with the weakest labour standards, environmental protections or any other regulatory measures. The relocation of Ramatex Company from South Africa to Namibia in the early 2000s proves the existence of this brutal reality (Juach 2018). In 2001, Ramatex contracted with the Namibian government which was bidding against South Africa and Madagascar for the same project. Namibia won the bid through offering even greater concessions seemingly above those granted to other Export Processing Zone companies and that employees in Namibia were paid less than employees in Ramatex factories in South Africa (Juach 2006; 219-225).

As already noted, African countries have concluded (or are continuing to conclude) BITs with developed nations in the hope of attracting more foreign “investment”. Quite sadly, African countries have traditionally accepted pre-drafted BIT models of these countries specifically the EU, Canada and US (Vandeveldt 2009: 3-35). The model BITs of these countries placed emphasis on BITs as tools for “investment” promotion and protection, with proposals to incorporate regulatory space and development considerations in the “investment” legal framework being viewed as an impediment to “investor” protection and promotion (Johnson 2010: 932). Could it be that African and other developing countries lack sufficient capacity in negotiating “investment” treaties that address their development needs or that they were so desperate for

FDI that they did not have time to prudently analyse the practical and legal implications of such BITs?

In principle, the role of BITs in attracting FDI is questionable. Some countries like South Africa and Brazil have revealed that they have for many years received more FDI inflows from countries they do not have BITs with as compared to countries with which they have concluded BITs. It is submitted that BITs do not create investment but create a conducive environment with which “investment” can thrive.

On the other hand, critics argue that FDI has many drawbacks including negative social and environmental impacts especially in extractive and heavy industries, lack of positive linkage with local communities, crowding out effect on local investments (Michalowski 2012). Michalowski (2012) notes that “this effect takes place when domestic enterprises abandon their investment plans to avoid competing with more efficient foreign companies and the released resources do not go to other activities in which local enterprises have stronger competitive advantages”.

FDI and Development in Africa

In absolute terms, Africa has received increased FDI inflows over the past few decades. UNCTAD reports that the average annual inflows of FDI to the continent, which reached US\$1.31 billion in the 1980s, has increased to US\$59.4 billion in 2016 (UNCTAD 2017: 43). As already mentioned, despite significant “investment” inflows, there is little or no evidence from the economic growth and development as well as the welfare of ordinary African citizens that FDI has economic and social development impacts. In fact, critical pan-African scholars vehemently argue that FDI has simply failed development in Africa and is just an epitome for resource plunder (Nhemachena & Warikandwa 2017; Warikandwa, Nhemachena & Mtapuri 2017; Nhamo & Chekwoti 2014).

Although it is considered trite that FDI has not contributed much to Africa’s development over the years, there are mixed findings as to the causes of such failure. Firstly, the failure of FDI to enhance African development is attributed to the specific conditions of host-countries, and the policy environment, especially in terms of the ability to diversify, the level of absorptive capacity, targeting of FDI and possibilities for linkages between foreign and domestic “investment”.

FDI is also identified as an epitome of resource plunder in Africa (Nhemachena, & Warikandwa 2017; Warikandwa *et al* 2017; Nhamo & Chekwoti 2014). That is, FDI is a neo-colonial weapon to exploit Africa’s natural resources and was never meant to aid the continent’s development. This

attitude towards foreign “investment” is based on ideological and empirical grounds.

The foregoing critique perceives capitalism in general, and foreign companies in particular, as agents of underdevelopment and merely continuing colonialism in another guise in Africa (Haberson & Rothchild 2018; Leys 1975; and Rodney 1981). This strong sceptical attitude towards foreign capital is deeply rooted in history, ideology and politics of the post-colonial era. The early experience of African countries with foreign companies from the Western developed nations continues to affect the official and public perceptions of FDI (Moss, Ramachandran & Shah 2005: 340). In Africa, colonial rule has not only meant the drainage of natural resources and the loss of opportunities for development, but has also contributed to the increase of social conflicts, environmental degradation and community displacements. In addition, the entrance of European capitalism or companies in Africa during the fifteenth century is ineradicably associated by the public with slave trade and as the foundation of colonialism or imperial expansion. Western capitalism (also known as neo-colonialism) championed by the EU and the US has been characterised with crude extraction of natural and mineral resources leaving local African communities faced with social conflicts, marginalisation, poverty and diseases (Nhemachena & Warikandwa 2017).

Additionally, there have been considerable complaints that foreign firms merely exploit local labour and make no contribution to the wider economy, either through creating jobs, training workers, or in using local suppliers (Jauch, 2008). More broadly, there is considerable concern that the interests of foreign firms will diverge from social development objectives and constrain governments’ ability to promote economic development (Chudnovsky & Lopez 1999). It is further argued that the mercantile is not concerned about equality, fairness and genuine justice or the livelihoods of those it affects but mainly generating massive profits from their economic activities (Warikandwa & Osode 2014). Africa is sustaining development in the West yet the continent is largely impoverished. Some of the ideological opposition to foreign “investment” is part of a general critique of capitalism - and more recently of globalisation - and foreign “investment” remains an easy target.

However, another school of thought propounded particularly by western oriented scholars is that the spectacular failure of FDI to foster development in Africa is suggestive of African governments’ lack of adequate “investment” policy formulation, coordination and implementation, thus undermining their competitiveness and compromising their ability to attract and maximise the benefits of “investment” (OECD 2002: 5). In this vein, African governments are blamed for their unsustainable national economic policies, poor-quality services, closed trade regimes, and problems of political legitimacy, thus advising

governments to redesign their macroeconomic, trade and industrial policies to attract FDI (OECD 2002: 5). This scholarship maintains that economic and social benefits associated with FDI are not automatic but can be fully translated into the host economy if there are adequate and complementary local capacities, as regards technological capabilities of host country enterprises, sufficient openness to trade, strong competition and robust regulatory frameworks, as well as quality education and infrastructure (OECD 2002: 5). In this perspective, designing and implementing appropriate “investment” policies is required if potential of cross border “investment” is to be maximised. The question is then how governments can count with a framework specifying policy interventions responding to the respective country and “investment” contexts may be required.

The role of FDI in Africa’s development cannot be properly assessed without taking into account other serious obstacles for growth improvement and poverty reduction including *inter alia* limited diversification of production, exports and budget revenues, and large deficit of infrastructure (Poor road infrastructure increases the costs of transport and doing business, and impedes trade in the region). Most African economies are mostly dependant on primary commodities (UNCTAD 2017; UNCTAD 2016). Conversely, despite the growing Africa’s ability and desire to attract modest amounts outside of the extractive industries, the continent still faces challenges of poverty and underdevelopment. A development model based on the extraction and exportation of raw materials (which are highly dependent on international export markets) is not viable.

More broadly, however, there is a growing recognition that Africa’s economic and political ills are in many respects self-inflicted. Corruption, lack of accountability, and absence of peaceful means for leadership change in most African states have been the major impediments to Africa’s development efforts (Chande 2014; Dubbelman 2012). Closely, “investors” with greater stake in the long-term “investment” might likely influence policy or, in the extreme, support political groups against the other. There is substantial and useful evidence in many African countries revealing how corruption and lack of accountability and transparency by political leaders in their deals with foreign companies has contributed to magnify economic underdevelopment and anti-foreign “investment” ideology (Sobjak 2018).

Recommendations

That the benefits of FDI are not forthcoming is not only indicative of the need for Africa to adopt a new development narrative but also suggestive of the need for certain kinds of host government intervention necessary to correct

market failures. It must, however, be noted that there is no one-size fits all approach to this effect. The net benefits of FDI reaped and their magnitude differs according to host country and context. “Investment” policy makers, when formulating “investment” policies, ought to have knowledge that is both cogent and applicable to their specific contexts. Nevertheless, these foreign development policies have failed to bring about economic growth and development, because development must be generated from within. As Ake (1996:140) notes, the primary principle of development is that the people, who are the end of development, must be the agents and means of that development. Mbeki (1998) emphasised that African renaissance “can only succeed if its aims and objectives are defined by the Africans themselves, if its programmes are designed by ourselves and if we take responsibility for the success or failure of our policies”.

In addition, while the development trajectory which emphasises the need to attract and promote FDI appears to be a noble idea, the entrenched ideological biases which underpin its core values, remain an area that demands a deeper process of decolonisation and introspection. Rutledge (2017) notes:

... with the recognition that a process of decolonisation is a critical part of any African future, the ongoing efforts to develop and reclaim the rightful place of an African world view and identity within the global contestation of ideas and systems, has moved from the abstract production of knowledge to congeal into a fully-fledged philosophical, political and economic movement by Africans to reappropriate control over the right to define for themselves who they are and who they should be but which right is still broadly defined by the former colonial powers of the West.

Africans need to rethink a development model which not only questions the relevance and domestication (by African countries) of the Eurocentric political and economic thought, but also offers a decolonial path to development. With respect to “investment”-oriented development, African governments must adopt sustainable and well-regulated “investment” regimes that can effectively catalyse and contribute to broad-based growth and development of the continent, and that is inclusive, environmentally friendly, socially responsible and appreciated by local communities. A typical example of this approach is the Africa Mining Vision (AMV), which seeks to tackle “the paradox of great mineral wealth existing side by side with pervasive poverty” (UNECA). The Africa Mining Vision was adopted by AU Heads of State at the February 2009 AU summit following the October 2008 meeting of African Ministers responsible for Mineral Resources Development. According to the AU, “the Africa Mining Vision is informed by the outcomes of several initiatives and

efforts made at sub-regional, continental and global levels to formulate policy and regulatory frameworks to maximise the development outcomes of mineral resources exploitation” (AU 2009). AMV seeks to improve mining regimes by not only ensuring that mining incomes and tax revenues are boosted and appropriately spent but also “integrating mining much better into development policies at local, national and regional levels” (AU 2009).

Furthermore, the African leaders have adopted the pan-African Investment Code (PAIC) whose key objective is to achieve growth that is more decolonial and widespread through promotion and protection of “investments”, leading not just to equality of treatment and opportunity for investors, but also to reduction of “investment” and trade barriers. PAIC is perceived as a useful guide for building a conducive environment for the development of a more vibrant and dynamic private sector that promotes intra-African trade and facilitates job creation (Mbengue & Schacherer 2017: 414).

Closely linked to the above, in decolonising the existing “investment” regimes particularly “investment” treaties with Western countries, it is very important for African governments to take into consideration the legal implications in relation to termination of such treaties. The process of termination of BITs is not without complexities. Some treaties may or may not be unilaterally terminated, some may be mutually terminated at any or agreed time by consent of all the contracting parties (Article 54 Vienna Convention on the Law of Treaties, 1969; Carska-Sheppard 2009: 755–771).

Equally important to this trajectory is the regulatory autonomy of the host states and “investment”. As sovereigns, states have a right to pursue public policy and sustainable development objectives for the benefit of their citizens, that is, legislating for public purpose and carving out their development priorities in “investment” treaties or arrangements with other states (Mouyal 2016 p. 8). This practice is certainly a legitimate governance issue (Desierto 2015: 1050). There has been an explosion of new generation “investment” treaties and/or policies promoting government regulatory authority, sustainable development and the realisation of human rights (Echandi 2006; UNCTAD 2012: 84-85). Most, if not all, old generation BITs concluded by African states with capital-exporting (developed) countries exclude regulatory freedom and development considerations (UNECA 2016).

It is also important to warn African governments that there is not a single country that has achieved development as a result of foreign aid (Moyo 2009). Moyo (Moyo 2009) uncompromisingly confronts one of the greatest myths of our time: that billions of dollars in aid sent from wealthy countries to develop African nations has helped to reduce poverty and increase growth. In fact, poverty levels continue to escalate and growth rates have steadily declined - and millions continue to suffer. FDI should not be perceived as the primary solution

to development problems. Rather FDI must be taken as a significant supplement to locally provided fixed capital rather than a principal source of finance. Thus, while FDI can contribute to capital formation, transfer of technology, enterprise restructuring and increased competition, the host governments must undertake basic efforts to raise education or skills levels, invest in infrastructure and improve the health of domestic business sectors. This requires African governments to improvise ways of raising funds for investment locally.

There is a need to strengthen democracy and good governance, establish a human rights culture, end and prevent conflicts. African leaders must deal with corruption and be accountable to one another for their actions. These measures are very important both for the wellbeing of the people of Africa and for the creation of positive conditions for “investment”, economic growth and development (Mbeki 2001). Accordingly, the promotion of democracy and good governance in Africa is not only important for attracting “investments”, but it also creates a favourable environment that supports entrepreneurship, trade and economic growth (Ake 2001).

Conclusion

Africa's dire need for growth and development is universally acknowledged. There are many ways and strategies for the continent to achieve this. This chapter has demonstrated that the continent has for many years attracted massive FDI projects and developed vast “investment” regimes - something which was considered a menu for advancing “investment”-led development - yet the continent has remained underdeveloped and heavily impoverished. Little or nothing can be shown from the welfare of general African citizens to the effect that FDI has contributed to growth and development. This has, among other things, raised questions among local communities as to the relevance of FDI in Africa's development. Consequently, there is a need for critical thinking on the use of FDI for Africa's development. “Investment” regimes ought to be revisited to ensure that they are an essential component to the achievement of Africa's long-term development (envisioned in the AU Agenda 2063), eradicate poverty and underpin sustainable growth and development across the continent. The key issue, however, is the formulation and implementation of workable “investment” regimes or strategies based on the African continent's unique strengths, rather than merely domestication of old (Eurocentric) “investment” strategies which have failed to enhance Africa's development.

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***Mukapuli and Another v Swabou Investments (Pty) Ltd* SA 49/2011 2017 NASC (23 Jun 2017): The Namibian Experience on Assumed Consumer Sovereignty in Credit Contracts**

Ndatega Victoria Asheela

Introduction

Consumer credit performs an important role in the economy and has been accurately described as the lubricant of economic life (Ramsay 2012). Since the 1980s as a result of the liberalisation of financial markets and the deregulation of credit markets, the use of consumer credit to pay for services has increased (Ramsay 2004; Department of Trade and Industry 2004). Consumer credit policy is therefore tailored to ensure affordable access to credit in order to enable the full participation of consumers in contemporary society (Ramsay 2006; Ramsay 2004). However, as consumers commit future income to present consumption needs it is inevitable that some consumers commit too many of their resources resulting in over-indebtedness (The Crowther Report 1971; Renke 2012).

In the Namibian context, a progressive increase in consumer credit over the years has been recorded, as is reflected by the profile of active credit consumers and the value of credit extended to consumers. This increase in consumer credit has been largely attributed to the growing rise in bank credit extended to consumers, as well as to the rapidly-growing micro-lending industry which provides credit services to low and no income consumers (Asheela 2017; Bank of Namibia 2014 & NAMFISA 2014). Consequently, the Bank of Namibia on numerous occasions has expressed concern over the continued growth in consumer credit, remarking that a large portion of the credit extended to consumers tends to be unproductive and increases the debt burden and servicing costs of consumers (Asheela 2017).

Noting that a direct consequence of the increase in the availability of consumer credit is the rise in the number of over-indebted consumers (Bank of Namibia 2014), there is a question as to whether or not the increase in the indebtedness of Namibian consumers warrants monitoring the parameters of credit granting for the protection of consumers. The aim of this chapter is to highlight, from a practical point of view with reference to the Supreme Court judgment in the case of *Mukapuli and Another v Swabou Investments (Pty) Ltd* (SA

49/2011 2017 NASC (23 Jun 2017), hereinafter “*Mukapuli*”), the plight of credit consumers in light of the current consumer credit legislative framework. The chapter is organized as follows: firstly, I begin by summarising the facts of this case and the issues it raises. Secondly, I highlight how the current Namibian consumer credit legislative framework does not address consumers’ best interests in credit lending. Thirdly, I argue that the Namibian consumer credit regulatory framework is based on an assumed doctrine of ‘consumer sovereignty’ which does not reflect the actual bargaining powers of the parties to credit contracts. In conclusion, it is submitted that there is a need for consumer credit legislative reform by embracing the responsible lending responses in order to protect consumers from irresponsible credit lending.

The *Mukapuli* Case: Summary of Facts

In the *Mukapuli* case, the Supreme Court of Namibia pronounced itself on the issue of consumer credit contracts after the appellants, husband and wife, noted an appeal against the High Court judgment which declared them indebted to the respondent in an amount of N\$177 743.46 plus interest at the rate of 13, 75 per cent per year (paras 3 and 6). The indebtedness arose as a result of a loan of N\$151 950 advanced to the appellants to extend their principal home in terms of a written agreement between the parties. As security, a mortgage bond was registered over the appellants’ home and the repayment of the loan was spread over a period of 30 years at an interest rate of 21,25 per cent per annum (para 6). At the time the bond was registered the husband was 52 years old and had eight years to go before retirement, the wife was 50 years old para 5. After August 2005 the appellants defaulted on their monthly instalments and the respondent issued a combined summons in which it claimed payment of the amount of N\$131 707.36, interest on that amount at the rate of 13.75 percent per year, calculated daily and compounded monthly, legal costs and that the property subject to the mortgage bond be declared executable (para 8). The proceedings were successful in favour of the respondents and it is that order which formed the subject of the appeal.

In adducing evidence to the court, the second appellant stated that, in her view, the debt had been fully paid because the amount paid back in terms of the agreement amounted to N\$249 882.07 whereas the loan amount was only N\$151 950 (para 37). To support this argument, she referred to instalment agreements when furniture is bought on hire purchase, highlighting the fact that the purchase price of the furniture plus interest are calculated and the total amount, being the purchase price and the interest payable combined, is then reflected in the hire-purchase contract for it to be clear to the consumer that that was the amount to be repaid (para 37). Further, she stated that the

respondent never told them that so much of the amount paid would go towards the payment of interest, and that had they been informed of this fact they would not have taken up the loan (para 37).

During cross-examination she admitted that it was their (appellants) signatures on the application form for the loan (para 38). To the fact that the form indicated that the loan had to be paid back over a period of 360 months, she answered that she and the first appellant signed the document without knowing what they were signing and only later became aware that the loan had to be repaid over 30 years because “she had not read the document and was only told to sign it” (para 38). She also could not remember whether the application form had been completed at the time of signing (para 39). Regarding other documents shown to her, she maintained that nothing had been explained to her (para 38) and that she saw the various bank statements only in 2007 (para 40). The Supreme Court accepted the findings of the court *a quo* regarding the credit agreement as pleaded by the respondent (paras 41 and 43), and stated that the appellants “signing of documents, or acceptance thereof, without reading or understanding them, had been of their own choice” (para 69).

Issues Flowing from the *Mukapuli* Case

In the context of the prevention of consumer over-indebtedness, responsible lending practices by credit providers play a crucial role in preventing consumers from over-indebtedness (Van Heerden & Renke 2015). In general terms, the concept “responsible lending” is used to denote the existence of regulatory measures enacted with the aim of preventing irresponsible credit lending and consumer over-indebtedness by ensuring that credit providers, in the pre-agreement stage of credit extension, assess the creditworthiness of the consumers and the affordability of the credit applied for (Consumers International 2013; paper by the World Bank 2013 & Asheela 2017). The *Mukapuli* case raises two substantial issues: firstly, the lack of primary debt prevention measures in consumer credit legislation aimed at protecting credit consumers from irresponsible credit lending and threats of consumer over-indebtedness. A consideration of the Namibian financial system and the consumer credit industry in particular reveals that credit products such as mortgage loans, car finance, instalment sales, leasing agreements, credit cards, overdrafts, other personal loans and advances, as well as microloans are offered in the Namibian credit market (Asheela 2017). Of all these, mortgage loans and microloans are said to be the leading cause of credit growth in Namibia and the consequent elevation in consumer indebtedness (*Ibid*).

Consumer credit in Namibia is regulated mainly by three pieces of legislation, namely the Usury Act 73 of 1968, Credit Agreements Act 75 of 1980

and the Sale of Land on Instalments Act 72 of 1971. The Usury Act merely provides for the limitation and disclosure of finance charges by placing a ceiling on the finance charges that a credit provider can levy on the principal debt in respect of a specific credit agreement and imposing financial charges control (long title). The provision for the compulsory disclosure of finance charges prior to the conclusion of any credit agreement is aimed at ensuring that the credit provider does not charge a higher rate of finance charge than the disclosed rate (Asheela 2017).

The Credit Agreements Act also contain primary debt prevention measures but only in the form of terms control, in that it authorises the Minister of Trade and Industry by regulation in the Government Gazette to prescribe the maximum periods of repayment of the full price in terms of the credit agreements and to prescribe the minimum portion or percentage of the cash price payable as a deposit with regard to credit agreements (section 3(1)(a) and 3(1)(b)). These measures can be categorised as primary debt prevention measures because of their cumulative effect on restricting the consumer's total eventual debt burden (Asheela 2017). The debt prevention measures in terms of the Sale of Land Act, on the other hand, are in the form of disclosure requirements. This Act requires that every written contract of sale and purchase of land *inter alia* should disclose the amount of the purchase price, the annual rate of interest to be paid by the purchaser if any, the date before which or the period within which payment of the purchase price with interest and all other charges shall be effected in full and the amount payable by the purchaser, if any, before he may take possession or occupation of the land (section 4(1)). It further requires the seller to provide the purchaser with a copy of the contract within one month after the conclusion of the contract at no charge, an annual statement of account at no charge, within one month after the conclusion of the contract, reflecting the purchase price, outstanding balance, interest and all other charges or costs incurred in terms of the contract (sub-sections 5 & 9). The Sale of Land Act further prescribes the frequency of calculating interest and limits the sum that the seller can recover from the purchaser (section 6).

Save for the debt prevention measures outlined above, the Namibian consumer credit legislative framework does not provide for responsible lending measures by for instance imposing an obligation on credit providers to conduct a pre-agreement assessment of the consumer's financial position and ability to repay the credit before extending credit to the consumer, raising questions of their adequacy in protecting consumers from irresponsible credit and over-indebtedness (Asheela 2017). This constitutes a "failure to provide effective protection against consumer over-indebtedness and to address irresponsible lending practices" (see Steennot & Van Heerden 2018).

Secondly, the *Mukapuli* case proves that predatory lending in the form of asset-based lending is taking form in Namibia (Rajapakse 2014). Asset-based lending has been defined in the Australian case of *Perpetual Trustee Company Limited v Khoshaba* [2006] NSWCA 41 128 as “to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default”. It is common cause that where a credit provider does not have regard to “the appropriateness of the credit terms” to the consumer or the consumer’s ability to service the loan, then such lending is not only predatory but also irresponsible (Tuffin 2009). The facts in the *Mukapuli* case suggest that the credit provider relied on the value of the consumer’s principal home rather than their income in granting a loan. The consumers were “not so young any more” with poor education and a low income, indicating that they were disadvantaged and vulnerable (Asheela 2017).

The lack of protective measures in consumer credit legislation for credit providers to assess the affordability of the consumer of the proposed credit and the general understanding of the proposed terms of the credit agreement with the consumer means that consumers are on their own. Without ruling out the possibilities of information asymmetry on the part of the consumer, the Supreme Court decision in the *Mukapuli* case supports the view that it seems there is an entrenched systematic assumed “consumer sovereignty” in the Namibian consumer credit regulatory framework, where consumers are perceived to have superior bargaining powers in the conclusion of credit contracts. In an era that has indicated that consumers are not rational beings and in need of protection, the continued application of the doctrine of consumer sovereignty in consumer credit policy calls for a revisiting.

The Concept of Consumer Sovereignty

The concept of consumer sovereignty was first coined in 1931 by W.H. Hutt and it implies “the sovereign-like rule of consumers over producers in markets” (Penz 1986). According to Persky, Hutt firstly defined consumer sovereignty in the following terms: “[a] consumer is sovereign when, in his role of citizen, he has not delegated to political institutions for authoritarian use the power which he can exercise socially through his power to demand (or refrain from demanding)” (Persky 1993). This definition was later rephrased to “the controlling power exercised by free individuals, in choosing between ends, over the custodians of the community’s resources, when the resources by which those ends can be served are scarce” (*Ibid*). The basic assumption underlying consumer sovereignty is that most individuals acting as producers attempt to maximise their incomes, by obeying to the directions of the consumers,

presupposing that producers ought to be inclined to their roles as servants of society (*Ibid*). In fact, Hutt has asserted that the plea for consumer sovereignty “rests on a common-sense view of history which suggests that the people will consent to be ruled only in a regime which can be seen to give them equal rights and equality of opportunity” (*Ibid*).

For purposes of this chapter, I adopt Cvjetanovic’s definition of consumer sovereignty which denotes consumers as “sovereign” beings who are responsible for deciding the products to be produced and the price at which those products are to be offered in the market, at the same time consistently making rational choices that improve consumer welfare and overall wealth (Cvjetanovic 2014). In the consumer credit market, however, the question that remains is whether or not consumers have the ability to always know what is in their best interests and therefore act accordingly. Cvjetanovic classifies the concept of consumer sovereignty into descriptive observation - where she argues that neoliberalism and descriptive observation offers an ineffective framework for achieving consumer interests, and the normative standard - which serves as an ethical standard against which consumers’ interests are to be assessed and therefore relies on the consumer finance market to achieve both ethically and economically favourable outcomes (Cvjetanovic 2014).

Under the traditional model of consumer credit regulation, the concept of “consumer sovereignty” was the central goal of consumer credit policy (Ramsay 2006). In this model of regulation there was less concern on the part of regulators as to the manner in which consumers exercised their sovereignty in the credit markets (*Ibid*). The 1971 Crowther Report captures the traditional model of consumer sovereignty in so far as it relates to consumer credit in the following terms: “[t]he first principle of social policy should be to treat the users of consumer credit as adults who are fully capable of managing their own financial affairs and not to restrict their freedom of access to it in order to protect the relatively small minority who get into difficulties”.

Fama also presents the hypothesis that a market in which prices fully reflect available information is efficient (Fama 1970). The rational choice theory which is advocated in the neo-classical model of regulation assumes that an unregulated perfectly competitive market will achieve an efficient allocation of resources and that market failure is the central rationale for state regulation should also be noted (Ramsay 2007). Reading Fama’s hypothesis with the rational choice theory which presupposes that human beings are “rational maximisers of preference satisfaction” (Posner 1997), it seems like if credit consumers are provided with accurate information about credit, then they are able to exercise their competitive choices effectively. Posner broadly explains that humans exercise their rational choice by comparing alternative means known to them in terms of cost, comfort and other dimensions of utility and

disutility, and then choose from this array the means with the greatest margin of benefit over cost (Posner 1997). In fact, a view has been expressed that if consumers are given the information needed to make rational choices, then “we can sit back and let the free market do its magic” (Prigden 2012). This view relies on an expectation that consumers are in a position to protect themselves and they make appropriate choices in the market place (*Ibid*).

Based on the assumption that rational informed consumers cannot borrow beyond their means and that credit providers cannot provide credit products or services if they have doubts about repayment, theoretically the burden was on credit consumers to determine the type of credit they needed. This burden is coupled with the responsibility of deciding whether or not they should enter into credit agreements by taking into account their personal circumstances and needs (International Financial Consumer Protection Organisation Report 2014). However, developments influenced by information economics recognised that consumers rarely possess the perfect information on “price, quality and terms to make efficient choices in the market” and identified imperfect consumer information as a fundamental rationale for consumer regulation (Ramsay 2007; Asheela 2017).

Further, insights from behavioural economics into consumer decisions tend to negate the above assumptions by arguing that consumers are not rational allocators of their resources and may well make wrong borrowing decisions even if they are provided with adequate information (Ferretti 2016; see also Howell 2005 & Sunstein 2006). A term first coined in neo-liberal models of regulation, the literature on behavioural economics has led to a new development in consumer credit policy that perceives credit as a product potentially dangerous to consumers (Asheela 2017). Consequently, a consumer who is fully “rational, fully informed and able to choose which is in his best interest, free of cognitive and other limitations, is replaced by a consumer, who is far more than expected irrational, impulsive and [led] by subjective-opinions, gossips or fears” (Grundmann & Atamer 2011). It is assumed that most unfavourable contracts are as a result of irrational, impulsive and financially illiterate consumers (*Ibid*). Given that unbounded rationality of the prospective consumer frequently impairs the consumers’ welfare due to wrong borrowing choices, it follows that a consumer is in need of protection in the credit market. In order to best protect consumers against their own biases and from those who exploit those biases, a need for a social model of regulation to protect consumers has been identified (Grundmann & Atamer 2011; Ramsay 2004 & Asheela 2017).

Nonetheless, Persy submits that Hutt’s notion of consumer sovereignty requires no assumption concerning the self-knowledge and rationality of consumers because the rational choice theory has never fitted well in the area of consumer choice (Perry, 1993). He affirms that a defence of consumer

sovereignty requires serious efforts to establish equal opportunity, which is far from the general endorsement of laissez-faire, implying that that state action is required to guarantee the active participation of all citizens in the economy on as equal footing as possible (*Ibid*).

Conclusion

The aim of this chapter was to highlight the plight of credit consumers in the Namibian consumer credit market with reference to the *Mukapuli* case. It was indicated above, that the Namibian consumer credit legislative framework appears to be based on an assumption that the credit consumer is sovereign and therefore does not encompass adequate debt prevention measures which operate to protect consumers from irresponsible credit granting and the risks of over-indebtedness. It is submitted that the Namibian consumer credit legislative framework is not equal to the task of combating over-indebtedness of consumers. The Supreme Court judgment in the *Mukapuli* case confirms that consumers falling victim to irresponsible credit granting and predatory lending are perceived to have made their choice and should therefore pay the price. In principle, this judgment is fundamentally correct because courts do not strictly make laws but apply the law as it is. However, in the interpretation of the applicable laws, courts may develop judicial precedent that is binding on the lower courts. It is therefore common cause that the Supreme Court missed an opportunity to develop consumer credit laws in Namibia by creating precedent for the lower courts which consider the socio-economic transformation of the less affluent members of society.

The assumed sovereignty of consumers ignores the realities of the credit markets as it does not reflect the actual bargaining powers of the parties to credit contracts. Credit providers are ignorant of consumers taking on credit they cannot afford as that is “their choice and personal responsibility” (Engel & McCoy 2011). This practice is also not awake to the fact that economic downturn following the 2008 global financial crisis has *inter alia* invoked a movement towards responsible lending practices in order to protect credit consumers from irresponsible lending and over-indebtedness. To have a body of consumer credit laws with no responsible lending measures in place indicates that the consumer bears the utmost responsibility in determining whether or not the credit is responsible and affordable for him. Further, credit providers are supposed to explain to consumers the specific features, risks and costs of the credit and ensure that the consumer understands the information provided before entering into a credit agreement with such a consumer. In conclusion, it is submitted that there is a need for consumer credit legislative reform by

embracing the responsible lending responses in order to protect consumers from irresponsible credit lending.

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International Trade Agreements and the Trade-Labour Linkage Debate: A Southern African Perspective – Part 1

Tapiwa V. Warikandwa

Introduction

The African Union (AU) is pursuing an integration agenda for the African continent with trade being used as an important element to creating productive employment and reducing poverty (Agreement Establishing the African Tripartite Free Trade Area of 2009; Mashayekhi Peters & Vanzetti 2012: 387; United Nations Conference on Trade and Development (UNCTAD): 2011; McMillan & Rodrik 2011: 25; and Hoekman & Winters 2007: 18). Southern African Development Community (SADC) is one of the AU's most recognised regional economic communities and is regarded as a fundamental building bloc with member states that have a common objective of regional integration (Mashayekhi *et al* 2012: 387; UNCTAD 2012). Trade between SADC member states is relatively high compared to other regions in Africa (Mashayekhi *et al* 2012: 387; UNCTAD 2009: 18). Recent studies have shown results that emphasise the essentially positive effect of regional integration in SADC and the importance of labour market policies to compliment trade policies in order to address employment concerns (Mashayekhi *et al* 2012: 387; McMillan & Verduzco 2011: 27). With regional integration being expected to increase wages and/or employment (Mashayekhi *et al* 2012: 387; OECD 2006; ILO 2010: 17; Kwelke & Mboya 2005: 41), one wonders why SADC countries are finding it difficult to implement their Social Charter obligations to the benefit of workers. One also wonders why SADC is also reluctant to support the incorporation of a social clause in the WTO if there is a fair measure of sustainable trade in the region (World Bank 2011: 9). The World Bank indicated that, "The region has been growing and transforming. From 2000 to 2008, Southern African countries grew rapidly and at much higher rates than the world average, infusing the region with a new commercial vibrancy. Growth was fuelled, in part, by the commodity boom which led to very high increases in export values, especially for South African minerals, to new fast-growing markets such as India and China...for the smaller SACU countries, large increases in revenue transfers were derived on the back of significant increases in a few highly-taxed South African imports (especially, motor vehicles and garments). Global markets were, and remain, the

primary driver of the region's growth"). Governments in the region have not been forthcoming with policy positions as to why they continue to prefer trade gains over a balance between trade gains and the protection of core labour standards in trade. One can only ascertain their intention from the labour rights violations taking place in their countries and the complaints that are continuously lodged by trade unions and civil society organisations.

This chapter seeks to establish why SADC countries are struggling to recognise labour standards in trade when trade is supposed to ensure an improvement in employment conditions (Klinger 2009). A critical analysis of the current events taking place in Southern Africa in relation to trade-labour linkage will show that a more aggressive and sustainable legal strategy may need to be adopted in order to improve the protection of core labour standards in trade. The developments in Southern Africa might offer a basis for strengthening calls for a trade-labour linkage in multilateral trade. The basis of such an argument is that the conditions prevailing in the Southern African region could be a true reflection of challenges being faced by developing countries in other parts of the world. As such, any lessons drawn from the region's experiences could be of practical usage on a global scale. In the context of this chapter, it is also extremely important to ascertain whether or not SADC countries like any other developing countries would suffer by improving labour standards in trade.

Southern Africa and the Social Clause

Since the inception of the WTO, the trade-labour standards linkage debate has been one of the most polarized issues in the world. Most of the countries in Southern Africa have not been cooperative in their response to calls for the inclusion of a social clause in international trade regulation. A number of developments currently inform the individual experiences of SADC countries regarding the trade-labour linkage. With most SADC countries being both recipients and providers of trade systems such as Foreign Direct Investment (FDI), there is growing concern that the process of competitive bidding between countries for investors may be inducing countries to offer concessions on regulation, taxes, environmental protection and labour standards that are unnecessary (Zapini 2008).

Many countries in the region have indeed sought to maximize trade gains at the expense of workers' rights and have preferred to lower their labour standards to attract investors, a development which appears to be advocated by influential institutions such as the International Monetary Fund (IMF) and the World Bank (Bretton Woods Update 2006: 1; World Bank's Doing Business Report 2007 which indicated that the World Bank would reward countries with

labour market flexibility (low levels of labour protection) with loans; IMF's World Economic Outlook, 2007 also urged countries to deregulate their labour markets to attract foreign investment; Bibby 2012). It could be argued that such policy positions apart from having a direct social impact in SADC countries may also impair the competitiveness of the domestic economy and reduce the potential for such investment to contribute to development (Zapini 2008: 2). A discussion of how the need to attract and retain investors has negatively impacted on workers' rights in the region follows. The countries discussed in this chapter have been chosen on the basis of availability of information regarding the violation of core labour standards in trade. An analysis of developments regarding a trade-labour linkage in these countries could be a fair reflection of the overall picture of the countries' attitude towards a social clause.

South Africa

The debate on the social clause in South Africa was addressed by the Congress of South African Trade Unions (COSATU) during the nineties with the debate appearing to have had a more public dimension (Garibay 2010: 12). Organized labour, the employers' associations and the government participated in consultations during the nineties and came to a framework agreement on the issue (Ibid). In its submissions to the South African Parliament, COSATU vigorously defended the incorporation of a social clause involving sanctions into free trade agreements in several resolutions and proposed the incorporation of a social clause into the European Union-South Africa Trade, Development and Cooperation Agreement (COSATU, 1999) as well as the Trade Protocol of the SADC (COSATU 1999). COSATU also advocated for the elimination of Export Processing Zones (EPZs) in the neighbouring countries and addressed the "race to the bottom" phenomenon (COSATU 2000). Simultaneously, COSATU expressed fear of possible protectionist uses of labour standards by the G-7 countries (Ibid. The G-7 began in 1975 as the Group of Six and included France, West Germany, Italy, Japan, United Kingdom and United States. It was later joined by Canada in 1976. In 1997, Russia was added to the group hence it is now known as the G-8). In 2005, COSATU confirmed its support for the inclusion of a social clause in the WTO (Ibid), a position which now starkly contrasts with the views of some current members of the South African government on the issue. Its textile affiliate, the South African Clothing and Textile Workers' Union (SACTWU), has underscored the labour standards argument in its position concerning Chinese imports (Kriel 2012. Taking into account the fact that the textile sector has been perceived as the main sector damaged by the Chinese imports, the absence of a position might be related to the quasi absence of textile affiliates within the other federations).

The main avenue through which COSATU attempted to translate its social clause proposal into policy was the National Economic Development and Labour Council (NEDLAC), a social dialogue organ formed after apartheid on the advice of the ILO and whose composition and functions were prescribed in the NEDLAC Act of 1994 (Buhlungu 2005: 702). At NEDLAC it was agreed that political, substantive and technical difficulties involved in promoting universal respect for labour standards called for a creative and multi-faceted strategy (NEDLAC 2008). NEDLAC incorporates representatives from labour, business associations, the South African government and the community (section 3 of the NEDLAC Act 35 of 1994). They are appointed by the corresponding minister upon a nomination by the relevant organizations (section 3(2) of the NEDLAC Act). It has four chambers, among which is a Trade and Industry one, which shares with the other chambers the tasks of concluding agreements, considering changes to social and economic policy (which includes trade) before they are discussed in Parliament, and promoting coordinated policies, among others (sections 8, 9 and 10 of the NEDLAC Act).

Trade policy is implemented in South Africa by the Department of Trade and Industry (DTI), which receives input from both NEDLAC and other ministries and agencies. NEDLAC labour and business representatives have been part of the South African delegations to the WTO Ministerial Conferences on at least two occasions: Seattle and Hong Kong (NEDLAC, 2006/2007). Even though the DTI has not externalized any opinion on the trade-labour issue aside from the WTO statements, the Trade and Industry Chamber of NEDLAC, of which the Trade Minister is a member, served as a forum for discussions on the social clause between 1995 and 1996 (NEDLAC 2001-2002). Labour representatives, backed by business, proposed the inclusion of a social clause in all South Africa's bilateral and multilateral trade agreements (Article 1 of the Framework Agreement on the Social Clause adopted on 28 June 1996). NEDLAC's Executive Council reached agreement on a landmark framework which, for the first time, linked South Africa's trade relationships with the promotion of human rights and, in particular, workers' rights (Barber 2005: 1079. Barber argued that the NEDLAC framework, "...embedded the social clause in the history of the struggle for human rights in South Africa, and stated that the commitment with workers' rights was a cornerstone of South Africa's new democracy". Besides the framework agreement, another measure linking trade and labour standards was the launching, in 1999, of the "Proudly South African" label, a certificate of compliance with certain labour and environmental standards. The Proudly South African campaign was negotiated and launched within NEDLAC, with the active participation of several ministries, among which the Department of Trade and Industry. According to a South African diplomat, the campaign was a way of countering the economic

competence by products from countries with low labour and environmental standards (such as the neighbouring countries); NEDLAC 2012). Central to the social-clause framework was the fact that it was viewed as not being a barrier to trade but rather a mechanism to engage South Africa's trading partners in a dialogue linking human rights with trade (Bezuidenhout 2000). The then NEDLAC Executive Director Jayendra Naidoo once said:

The social-clause framework negotiated by business, labour and government delegates at NEDLAC reaffirms the principle that economic growth and development must be underpinned by a commitment to social justice, including respect for universally recognised labour standards. The danger is that with the liberalisation of world trade and the globalisation of the world economy, workers' rights will be downgraded to requirements below the basic acceptable levels. The principles underlying the social-clause framework mean that South Africa will champion a move to improving the rights and conditions of workers worldwide (Naidoo 2000).

In implementing the social-clause framework, South Africa ratified the core ILO Conventions which relate to labour standards. Naidoo at that time stated that:

Two of the Conventions (freedom of association and the protection of the right to organise) have already been ratified by government, and NEDLAC has recommended that three others (relating to forced labour, the abolition of forced labour, and discrimination) be ratified during the 1996 parliamentary session (Ibid).

The second phase of the social clause framework adoption for South Africa required that it enter into memorandums of understanding with its trading partners which would commit both parties to ratifying, upholding and promoting the ILO's Conventions on trade union rights, collective bargaining, and fair employment practices (Barber 2000: 1079). Regional initiatives to promote the framework agreement also began with the issue being put on the agenda of the Labour and Employment Commission of the SADC, and by utilizing the Social Charter in Southern Africa to promote workers' rights (Barber 2000: 1080).

However, consensus on the importance of a social clause in trade in South Africa is fast decreasing. NEDLAC's 2005 Annual Report stated that the Trade and Industry Chamber did not manage to achieve a common position on the social clause (NEDLAC, 2004/2005). In August 2011, the South African cabinet had to rush to dismiss speculation that South Africa's rigid labour legislation might be eased in the interest of job creation following

pronouncements on the matter from Finance Minister Pravin Gordhan and Minister in the Presidency Trevor Manuel. The two ministers were of the opinion that labour standards in the country must be relaxed to create more jobs a view which goes against the spirit of a social clause. On August 15 2011, Minister Pravin Gordhan suggested that South Africa might have to relax its labour laws in certain cases to grow jobs (BusinessDay 2011). At a conference in Johannesburg, he told internal auditors that, “We may have to change the way we see the labour dispensation in South Africa” (Ibid). His statements were prompted by threats made by Chinese owners of clothing factories in Newcastle, KwaZulu-Natal to close and relocate to Lesotho, Swaziland or Botswana if they were forced to pay a minimum wage (Ibid).

It appears from the minister’s response that the view amongst some in the South African government is that jobs must be created even if such a development does not result in significant benefits to the workers. It is imperative to analyse the minister’s views as they set a bad example to other countries in the region and give the impression that when faced with threats by foreign investors to leave due to a higher compliance with labour standards, a country must embark on a race to the bottom as a solution to such impending action. Indeed, the minister’s statements add to the already growing concerns that:

...the process of competitive bidding between countries for FDI may be inducing countries to offer concessions on regulation, taxes, environmental protection and labour standards that are unnecessary. Apart from the direct social and environmental impact, these concessions may impair the competitiveness of the domestic economy, reduce the potential for such investment to contribute to development, and ultimately impede the entry of FDI. ‘Beggars-thy neighbour’ investment incentive competition may even distort the international allocation of FDI away from sites with a potentially higher return in terms of development and to investors (Zampini 2008: 1).

Zampini has observed that, “It is worth nothing that the international labour movement has a fairly idiosyncratic relationship with the way information is presented in the Doing Business reports of the World Bank and International Finance Corporation (IFC) since their first issue in October 2003” (Zampini 2008: 8). In a way, Zampini’s view implies that the policy positions adopted by countries, in particular developing countries, concerning how they conduct business are prescribed for them. It is from this perspective that in 2006 the International Trade Union Confederation (ITUC) claimed that data collected through the Doing Business process has been used to promote labour market deregulation and to recommend that governments implement specific measures

to infringe workers' rights (such as social protection) with flagrant disregard to the poverty impact of such measures and their implications for employment, wages, working conditions and respect for workers' fundamental rights (ICFTU 2006; Zampini 2008: 8).

South Africa was given as an example of countries affected by proposals made through the Doing Business process. In the 2006 Doing Business report, South Africa was considered a business unfriendly environment with reference to the "Grounds for firing" category (See the World Bank Doing Business Report of 2006. See also the 2011 World Economic Forum Global Competitiveness Survey which indicated that South Africa currently ranks fourth to last in the world in terms of "flexibility in wage determination" and third last in "hiring and firing practices"). The grounds for firing in South Africa were viewed as inconsistent with rules such as 'the employer may not terminate employment contract without cause' (World Bank Doing Business Report of 2006) and 'the law establishes a public policy list of "fair" grounds for dismissal' (Ibid). The report failed to remind the reader that the higher hiring-and-firing indicators for South Africa in comparison to the Organisation for Economic and Cooperation Development (OECD) countries were explained in part by the country's affirmative action programmes, adopted by post-apartheid governments to overcome the legacy of decades of racial discrimination in the labour market (Zampini 2008: 8).

In 2008, Business Unity South Africa (BUSA), the voice of South African organised business, expressed concerns over the methodology and approach adopted in the Doing Business reports (Ibid). Reservations were expressed to the effect that Doing Business indicators, since 2003, have been used with a regional leverage (World Bank 2005: 19. In this report, the World Bank argued that a 'good investment climate fosters productive private investment; the engine for growth and poverty reduction. It creates opportunities and jobs for people'. As a result, regional development plans such as the SADC's Regional Indicative Strategic Plan (RISDP) 2004 and the New Economic Partnership for Africa's Development (NEPAD) rely heavily on achieving macroeconomic stability as a basis for attracting investors). Countries were advised to gauge their labour market rigidity indices as recorded under the 'Hiring and Firing Workers' section and take actions to get them lower than the regional average (World Bank Doing Business Report of 2006). Unions argue that the 'Doing Business' Report has been used in SADC countries to place downward pressure on workers' protection. For example, in the 2006 International Monetary Fund (IMF)'s Article IV Consultation report on Lesotho recommended a downward flexibility of real wages in Lesotho so as to 'improve competitiveness' (IMF 2006: 16-17). The IMF report did not mention that wage levels in Lesotho are already lower than those in other countries in Southern Africa. For example

wages in Lesotho's garment manufacturing sector were already less than a third of those in neighbouring South Africa (Zampini 2008: 8). In turn, Lesotho's low wage levels were mentioned in the IMF's 2007 Article IV report for Swaziland, in connection with a recommendation to the local government to 'reduce the cost of doing business', which emphasises that wages in Lesotho were only half of those in Swaziland (IMF 2007: 14-15). It is worth noting that Lesotho and Swaziland are the countries to which Chinese companies operating in Kwa-Zulu Natal threatened to relocate to. One can thus conclude that the fear of losing the Chinese as investors drove minister Gordhan to call for labour market flexibility in line with the World Bank and IFC proposals. After all, the ITUC has also noted how the World Bank in its Country Partnership Strategy (CPS) for the Republic of Mauritius:

...announces the availability of a Development Policy Loan for 'reforming the labour market', one facet of which will be 'overhauling the current tripartite wage-setting machinery'. The overall aim of the reform, according to the CPS, 'is to secure a position for Mauritius in the top ten most investment and business-friendly locations in the world ... (ITUC 2007: 23).

The picture that is portrayed by the World Bank from the above analysis is that lowering labour standards attracts investors and makes countries eligible for investment loans. If that is the case then it is logical to ask how international trade and investment are influencing the quality of employment in countries if at all there is any such influence. This may help SADC policy makers to adopt the appropriate investment plans which are implemented in the best interests of their countries.

Flanagan and Khor tried to establish how cross-border economic activity influences working conditions and core labour rights (Flanagan and Khor 2012: 260). They observed that, "Trade policies enhance or retard the evolution of international flows of economic activity with trade policy negotiations often provoking strong sentiments regarding the links between trade liberalisation and labour conditions" (Ibid). They also argued that:

Recognising the powerful influence of per Capita Gross Domestic Product (GDP) opens broad short-term and long-term policy menus for advancing labour conditions. In the short-run, severe recessions tend to degrade the labour conditions of the employed in addition to reducing employment and output. Deploying a nation's fiscal and monetary policy weapons to remove gaps between actual and potential GDP restores both the quantity and quality of jobs. In the long run, even under autarky, a country's labour conditions can improve with higher rates of technical progress, investments in physical and human capital, and the

establishment of institutions that clarify property rights enforce contracts and reduce corruption.... (Ibid: 268).

Mashayekhi *et al* have stated that trade is an important element of creating productive employment and reducing poverty (Mashayekhi *et al* 2012: 387). However it still must be questioned why no distinct improvement in labour standards is being observed in SADC, a region which compared with other regional economic communities in Africa, has a relatively high share of intra-SADC trade at 11% of the region's total trade (Ibid, 388). Could this suggest that SADC leaders are only paying lip service to the objectives set in the SADC Social Charter whilst trying to conform to the demands of institutions such as the IMF with the hope of accessing loans?

The answer to the above question could be partially found in Minister Gordhan's other proposal made in response to the Chinese threats. Gordhan argued that labour laws might have to be relaxed to allow young people to enter the workplace and gain skills and experience at lower wages, but not at the expense of people who already had jobs (BusinessDay 2011). Gordhan's proposal appears to be supported by Scarpetta *et al* who in 2010 stated that:

One way to encourage the employment of young workers, very common in Organisation for Economic Co-operation and Development high-income economies, is to apply a lower minimum wage, called an "apprentice wage," for young people below a certain age. This encourages employers to hire first-time employees, and it can ease the transition to permanent employment, especially where employers commit to training the young employees (Scarpetta *et al* 2010: 106).

Whether such a policy initiative would be successful in developing countries is subject to debate. South Africa through its National Youth Development Plan (Integrated Youth Development Strategy for South Africa 2011; South African National Treasury Discussion Paper 2011) has tried to implement the South African Youth Wage Subsidy Plan (Donnelly 2012; COSATU 2012; Malikane 2012; United Nations and African Development Bank Report on Youth Wage Subsidy 2012). In his 2010 State of the Nation Address, South African President Jacob Zuma announced for the first time the proposed youth wage subsidy which was intended to help first-time job seekers gain entry to the labour market. COSATU objected to the subsidy which it claimed would open the door to cheap labour and jeopardize existing jobs (State of the Nation Address by former South African President Mr Jacob Zuma 2010). COSATU's argument compelled the South African government to backtrack on its proposals to implement a R5 billion youth wage subsidy. Was COSATU wrong in its analysis?

Probably it was not. After all, could such an initiative in developing countries not simply expose the young workers to employers such as the Chinese who would gladly employ the young and cheap labour whilst doing away with skilled and fairly expensive labour? This must be viewed in light of the fact that the Chinese have been complaining about the imposition of a minimum wage and have even threatened to close their factories and relocate to Lesotho where there are extremely flexible labour standards (Hall 2011). The proposals made by Minister Gordhan are worrisome if one considers that China's record in violating core labour standards is not improving but worsening. See also ITUC 2012. The ITUC in its 2012 survey observed that, "Labour activists and rights groups are regularly harassed while internal migrant workers continue to be discriminated against. Child labour is believed to be on the increase as a result of the relative slowing down of the economy amidst the global recession and law evasion from companies, including multinationals"). It appears that Gordhan's policy initiative was consistent with the IMF position which calls for labour market policies that include measures to reduce labour costs and increase labour market flexibility (World Bank Doing Business Report 2012: 1; Haltiwanger *et al* 2008).

The main political opposition party in South Africa, the Democratic Alliance (DA) (The Democratic Alliance is a South African political party, the governing party in the Western Cape province and the official opposition to the ruling African National Congress (ANC). Its present leader is Helen Zille who succeeded Mr. Tony Leon in May 2007. Its policies are centrist and it is a member of Liberal International and Africa Liberal Network) supported the views of Ministers Gordhan and Manuel. Its spokesperson Ian Ollis argued that, "Labour market rigidity is a major driver of our country's jobs crisis" (Ollis 2011). Ollis' view has been endorsed as the DA's official policy position concerning a trade-labour linkage in that whilst commenting on the proposed 2012 Labour Bills of South Africa, the party stated that:

The proposed amendments to the Basic Conditions of Employment Act (BCEA) and Labour Relations Act (LRA) will exacerbate existing regulatory rigidity and further stifle the labour markets. Additional regulation will only serve to raise the cost of employment for businesses and therefore intensify our current unemployment crisis (DA's Position Paper on the Basic Conditions of Employment Amendment Bill and the Labour Relations Amendment Bill, 2012: 3).

From the above statement, it is clear that the DA judges any proposed amendments to labour legislation on the merits of their impact on job creation (Ibid: 4; Sapa 2012; Motau 2012). As such, the DA is of the view that before any

labour legislation can be amended, it must be ascertained whether or not the proposed labour bills will create a more job-friendly environment (DA's Position Paper on the Basic Conditions of Employment Amendment Bill and the Labour Relations Amendment Bill entitled "Labour Laws must Accelerate Job Creation" July 2012: 4). Therefore the DA argued that a further tightening of the labour market in South Africa would only increase the cost of labour and therefore suppress employment even further (Ibid).

As a basis for their policy position, the DA made reference to a 2009 study on labour market regulation across 73 countries by the University of Bath, which found that tight labour market regulation increased unemployment all over the world (Feldmann 2009: 76; Almeida *et al* 2009: 28; Lee *et al* 2008; World Bank 2008). The DA deemed the study as particularly relevant to South Africa as it is one of the first to cover not only industrial countries but also developing and transition countries. The research concluded that adverse labour market effects are probably due to lower investment by domestic firms as well as lower FDI inflows caused by stricter market regulation (Feldmann 2009: 90). Furthermore, the research found that stringent hiring and firing rules have particularly adverse effects on unemployment, with the most severely impacted being women and young people (Feldman 2009: 79-80). The DA also made reference to a 2010 Regulatory Impact Assessment (RIA) carried out by the Development Policy Research Unit at the University of Cape Town. The RIA established that South Africa's wage-employment elasticity was estimated at 0.7 %, which means that an increase in the cost of hiring workers of 1% is likely to translate to a decrease in employment of 0.7% (Department of Labour Report 2010; Bhorat & Jacobs 2010).

The DA's position on labour market flexibility is also supported by the World Bank's controversial "Employing Workers Index" (EW Index) (Lee *et al* 2008: 416. Lee *et al* note that, "The "Employing Workers" Index (EW index) was developed by the World Bank as part of its "Doing Business" indicators (DB indicators). This controversial project represents an important attempt to measure "business regulations" and their enforcement across 178 countries, and provide a guide for evaluating regulations that directly impact on economic growth, allowing for cross-country comparisons and identification of good practice." See also World Bank 2012), which the World Bank introduced as part of its Doing Business (DB) indicators (Lee *et al* 2008: 416. The key product of the Doing Business project, as pointed out by Lee *et al*, is an "ease-of-doing business" index. It is made up of ten sub-indices including the EW index, which measures the cost of labour market regulations. This index is a composite indicator based on measures of three elements: difficulty of hiring; rigidity of working hours; and difficulty of firings indicators). Lee, McCann and Torm note that:

Since the DB project was launched in 2004, the World Bank's assessment of existing regulations in developing countries has been predominantly negative. Rigid labour market policies are blamed for poor labour market performance, such as low productivity, high unemployment and informal employment, while a more flexible regulatory framework is perceived to be associated with increased growth and employment creation (Lee et al 2008: 416; Rodrik 2012; Rodrik 2006: 973).

The DB indicators mirror the Washington Consensus (Williamson 2004). The term Washington Consensus was coined in 1989 by the economist John Williamson to describe a set of ten relatively specific economic policy prescriptions that he considered constituted the “standard” reform package promoted for crisis-wracked developing countries by institutions such as the International Monetary Fund, World Bank, and the US Treasury Department. The prescriptions encompassed policies in such areas as macroeconomic stabilization, economic opening with respect to both trade and investment, and the expansion of market forces within the domestic economy) principles (Williamson 2004: 3. The Washington Consensus principles included the following: Fiscal policy discipline, with avoidance of large fiscal deficits relative to GDP; redirection of public spending from subsidies (especially indiscriminate subsidies) toward broad-based provision of key pro-growth, pro-poor services like primary education, primary health care and infrastructure investment; tax reform, broadening the tax base and adopting moderate marginal tax rates; interest rates that are market determined and positive (but moderate) in real terms; competitive exchange rates; trade liberalization: liberalization of imports, with particular emphasis on elimination of quantitative restrictions; any trade protection to be provided by low and relatively uniform tariffs; liberalization of inward foreign direct investment; privatization of state enterprises; deregulation: abolition of regulations that impede market entry or restrict competition, except for those justified on safety, environmental and consumer protection grounds, and prudential oversight of financial institutions and legal security for property rights) which were believed to be necessary for the recovery of Latin America from the economic and financial crises of the 1980s (Broad 2004: 129). Latin American countries embraced the Washington Consensus and almost immediately started to gain short-term benefits from it (Frers 2014). Frers the Director of the Fiscal Policy Program *Centro de Implementación de Políticas Públicas para la Equidad y el Crecimiento* (CIPPEC) (The Centre for the Implementation of Public Policies Promoting Equity and Growth (CIPPEC) links research and policy to improve the livelihoods of people in Latin America and the Caribbean. CIPPEC advocates for greater use of research by civil society organisations and think tanks that are trying to influence decision-making processes in Argentina and Latin America. In 2005 CIPPEC consulted with the Overseas Development

Institute in the United Kingdom to coordinate the Civil Society Partnerships Programme (CSPP) in the Latin American and Caribbean region) of Argentina noted that:

Latin America strongly embraced the Washington Consensus. For example, as a result of monetary prudence, inflation went down to single digits almost everywhere. Also, as a consequence of fiscal discipline, average budget deficits went down from 5 percent of the GDP to an average of 2 percent, and public debt went from 50 percent of the GDP to less than 20 percent. After trade liberalization, tariffs went from an average of more than 40 percent to nearly 10 percent. Also, after financial liberalization, direct credit controls were abandoned, interest rates were deregulated, FDI regimes were open, and foreign exchange and capital account controls were dismantled. Finally, more than 800 public firms were privatized between 1988 and 1997 (Frers 2014).

Regardless of the almost immediate success of the Washington Consensus, Frers was quick to point out that:

Not all results were as good as expected. On the positive side, there was a surge of private capital influx into the region that went from \$14 billion in 1980 to \$86 billion in 1997. There was also an expansion of investment and export volumes. On the negative side, it must be admitted that real GDP growth only amounted to 3 percent a year for a decade, or just 1.5 % per capita. That was barely better than the 2 percent displayed during the lost decade of the 1980s and well below the rate of 5 % displayed during the 1960s or the 1970s. After the reforms unemployment rose, poverty remained widespread and there was generalized disappointment and sense of injustice. There was a sharp rise in crime and violence (Ibid).

The lessons to be learnt from the failures of the Washington Consensus according to Frers were that:

Today there is generalized consensus that countries should focus on equity and income distribution as objectives in themselves, and not only as preconditions for sustainable growth... There is consensus that there is a need to tax the rich and spend better on the poor. There is still consensus that economic cycles must be smoothed, and this can be done through fiscal rules and safety nets. Also, another item that is considered today very important is that liberalizations should be done gradually and cautiously until regulatory and supervision capacities are strong. There is an additional powerful rationale that crises are particularly harmful to the poor and others in the bottom half of the income distribution (Frers 2014).

The failure of the Washington Consensus upon which the DB indicators are modelled raises serious questions as to whether or not the Bretton Woods Institutions are playing a role in forcing developing countries to lower their labour standards in order to promote short-term trade and investment gains. The starting point in addressing this question is to observe that there is an argument to the effect that rigid labour legislation could cause an undesired effect to the economy which has been used by developing countries to lower labour standards in order to attract investors (Create Economy Report 2010: 99; Botero *et al* 2004: 1339, Djankov 2007; Djankov *et al* 2006; Djankov 2008). The DA suggested that there was need to introduce labour reforms that would make the labour market less rigid, more flexible in wage determination and introduce more accommodating hiring and firing regulations, whilst respecting the four key labour principles of the ILO (See the DA's Position Paper on the Basic Conditions of Employment Amendment Bill and the Labour Relations Amendment Bill entitled "Labour Laws must Accelerate Job Creation" July 2012 13).

However, questions are also raised about the DA's proposals which are in line with the DB indicators. One such question is that whilst it might be argued that rigid labour legislation could negatively impact the economy, would labour market flexibility not equally affect workers in developing countries, who are not as privileged as workers in developed countries, a development which could harm the economy in the long run and render the DA's model a failure? Could the failure of the Washington Consensus in Latin America not be an indication that labour market flexibility is not necessarily the best approach to promoting trade and luring investment in developing countries? Perhaps the DA holds well-meaning policy proposals which nevertheless could be ill-suited to the context of developing countries in which they have to be applied. In addition, it must be asked how less rigid labour legislation intended to protect the rights of the previously and still disadvantaged workers in South Africa should be when there are persistent challenges currently being faced by the workers due to the effects of globalisation. Could Ian Ollis and the DA be missing something which the two ministers also missed?

COSATU spokesperson Patrick Craven pointed out what those who call for the weakening of labour standards could be missing when he argued that:

While executives continue to laugh all the way to the bank, with massive remuneration packages, millions of workers continue to earn starvation wages, from which they are forced to support more family members due to high levels of unemployment, and have suffered massive casualization, including through intensive usage of labour brokers as a clear strategy by companies to circumvent progressive labour laws (Craven 2011).

The recent developments in South Africa's Platinum mining belt illustrate the dangers posed by companies profiteering at the expense of workers who are subjected to cheap labour in flexible labour markets which Craven referred to (Howick 2012). The South African mining industry has been experiencing increased levels of industrial action, developments which have emerged as a significant risk to the industry and economic development in the country. Aquarius (See the Aquarius Platinum website available at <http://aquariusplatinum.com/> (accessed 20 August 2018)) the world's fourth largest producer of platinum retrenched two thousand workers and closed operations at its Everest Mine in early 2012, citing labour unrest as the reason for winding up its operations (Reuters 2012). Another Platinum mining company Implats (See the company profile which is available at <http://www.implats.co.za/implats/Company-profile.asp> (accessed 23 August 2018)) experienced a six-week industrial action in February 2012 which sliced 21 percent off its full-year output and, combined with declining metals prices, led to a sharp cut in its dividend, to R1.95 a share from R5.70 last year (Ibid). Three lives were lost during the strike at Implats (Ibid). The industrial action cost the company, which produces 30 percent of global platinum, 120 000 ounces in lost production and translated into R2.8 billion in lost revenue (Ibid).

In August 2012, the London listed Lonmin's Marikana mine experienced an illegal industrial action that resulted in the deaths of a total number of forty-four people. Webb has argued that, "What no one has dared to say, aside from the miners themselves, is that the mining industry remains dependent on cheap and flexible labour" (Webb 2012; Feinstein 2005: 211; Naicker 1976). A Bench Marks Foundation study of platinum mines in the North West Province of South Africa revealed that a number of factors led to the rising discontent of workers (Bench Marks Foundation "Communities in the Minefields" 2012. Bench Marks Foundation notes that 80% of the world's platinum is in South Africa (SA) yet the social conditions for mining communities in the platinum belt have not improved. Citigroup noted that the platinum industry is worth 2 trillion Rands. All these facts raise questions as to why the social conditions of workers are not improving). Lonmin was singled out as a mine with high levels of fatalities, very poor conditions for workers and unfulfilled community demands for employment (Ibid. The Centre for the Study of Violence and Reconciliation (CSVR) together with the SA Human Rights Commission also revealed that Lonmin signed an agreement with the World Bank's International Finance Corporation in 2007 to develop the local community. However, CSVR's director Delphine Serumaga said, "It appears that Lonmin has not met its obligations it agreed to with the International Finance Corporation"). The company also effected a mass dismissal of nine thousand workers in May of 2011, a development which raises questions as to whether or not there are any

gains for developing countries from foreign investors on a long term basis (The continual retrenchment of workers by the platinum mining companies raises questions as to how labour market flexibility is expected to create more jobs in South Africa. It appears that regulated labour market flexibility seeks to achieve the opposite of job creation by allowing companies to hire and fire as they please. This appears to defeat the objectives of the 2012 SA National Development Plan 2030 which aims to create more jobs for its citizens). How such developments prevail in a company which in 2011 made nearly R2 billion in profit is difficult to comprehend (Lonmin 2011 Annual Report. See also Marketline Advantage Reports on South Africa's Platinum Group Metals 2011). The company was able to pay its nine executive directors a total of R 45 million in the year 2011, a figure which is above the total salaries budgeted for all its mining employees for the year 2012 which was pegged at an estimated R44 million (Hlongwane 2012). It is also hard to understand how the miners who work hard to drill platinum which per ounce sells at about USD 1444 on the international market end up taking home around USD 500 per month (Jenneman 2012).

The South African Chamber of Mines (SACM) has argued that the miners' demands for a salary of R12 500 per month are economically unsustainable (Sapa 2012). Whether or not this argument is plausible is subject to debate. A question which must be raised though is how the SACM addresses the observations made by Maleki to the effect that:

Lonmin Plc's 2011 revenues equates to an average of \$71,665 per worker, if the money was divided equally between individuals (Calculated from the total 2011 revenue of \$1,992 billion divided between 27,796 employees. Those rock drill operators who were massacred by police on August 16 were paid a very small fraction of this total, only \$3,600 to \$6,000 each per year (Calculated from the monthly wage range of rock drill operators: \$300 - \$ 500). The more the workers are paid, the less can go to pay for the enormous profits of top investors and executives, such as the executive director's nearly \$884,000 in compensation (This is the total cash compensation and does not include possible stock options). This is the simple recipe for the concentration of wealth: in the extreme, the chief executive earns the same as about 245 rock drill operators combined (Maleki 2012).

It must be pointed that no one is against businesses profiteering as trade gains constitute the basis of doing business. However if business is done with a gross disregard of human rights then there might be a problem. After all, as has been evidenced by the developments in the aftermath of the Marikana massacre, the use of cheap labour is not a competitive advantage but a threat to business. Multiple strike actions have recently engulfed the South African mining

industry. At the time of this study, Anglo-American Platinum the world's largest platinum producer had closed its mine in Rustenburg in fear of the victimisation of its workers by other striking workers (Reuters 2012). Goldfields' workers had also joined the strike demanding the same amount as the R 12 500 which led to the impasse at Lonmin (Post 2012). A total of 55 people had been killed since the beginning of the strikes in the South African platinum belt in 2012 (York 2012).

With the strikes threatening operations, the cost effect of Lonmin closing down its operations due to the difficulties of doing business would lead to 35 000 workers losing their jobs (Sapa 2012). This would worsen the situation in South Africa which has almost half of its 52 million citizens living in poverty with Labour Force Survey figures indicating that 60% of all workers in South Africa earn less than R 2500 a month (Statistics South Africa 2012). Many of these workers are the sole income earners in their households. This development mirrors the failure of the Washington Consensus in Latin America as already alluded to in this chapter. Could this be the competitive advantage that cheap labour brings? The crippling strikes in the mining industry were continuing at the time of this study with Lonmin having missed the production target of a saleable 750 000 ounces of platinum which translates to lost revenue estimated at R 800 million within 37 days.

However, the Lonmin strike came to an end after an agreement by the company and the workers which resulted in a 22% wage increase across the board for the mine workers in addition to a R2000 once-off bonus (Masombuka 2012). Strike actions are continuing at other mines. There are concerns though that the wage increase may lead to job losses as Lonmin seeks to cut operating costs. Lonmin has tried to dismiss such concerns by indicating that it will not reduce the number of miners. Only time will tell. Important questions are raised though. Does it take workers to undertake an illegal strike action for them to be given a record pay rise in South Africa in the history of wage negotiations? If so what example does such behaviour set concerning wage negotiations and the investor friendly nature of the country? Should the government not develop a policy to address the workers' grievances as well as the role of companies in ensuring sustainable development? All these questions need proper answers in order to ensure an investor friendly environment in the country.

There are lessons to be drawn from the Marikana Lonmin mine incident in relation to Craven's sentiments. Trade unions are also liable for the escalating poor labour conditions experienced by workers. The differences between the National Union for Mineworkers (NUM) (The National Union for Mineworkers (NUM) was formed on the 5 December 1982 and is the largest recognised collective bargaining agent in the South African mining industry) and Association of Mineworkers and Construction Union (AMCU) (The

Association of Mineworkers and Construction Union (AMCU) was formed in Mpumalanga South Africa in 1998 as a breakaway faction of the COSATU affiliated NUM. It was formally registered as a Union in 2001. The union sees itself as distinct from NUM in that it contends that it is apolitical and non-communist. Its competition with NUM over bargaining rights at Lonmin mines in the Rustenburg culminated in the violent Marikana miners' strike which resulted in what is now known as the Lonmin or Marikana massacre) fuelled the tensions already existing concerning legitimate calls for an increase in wages made by the Marikana mine workers. NUM, an affiliate of COSATU has been accused of ignoring the workers' interests in favour of promoting their business ventures and liaisons with companies (Sibeko & Dolan 2012). AMCU has been accused of taking advantage of workers' plight and turning it into an opportunity to fan violence in the mining industry so as to appear as if they are concerned about the latter's problems (South African Labour News, 2012). However, disrupting business is hardly the right course of action to take when the workers themselves are already impoverished due to the little wages they receive and the inescapable conclusion that companies may be forced to shut down as a result of the strike actions, a situation which further worsens the plight of the already disadvantaged workers and their families. The "no work no pay" principle has seen striking workers rely on borrowing money from loan sharks and receiving handouts from Gift of the Givers (an NGO requested to assist the workers in the face of a worsening humanitarian crisis) in order to feed themselves and their families (Gift of the Givers 2012; Davis 2012).

On 14 September 2012, Gordhan who had initially proposed the relaxing of South African labour laws to allow for labour market flexibility noted that the increasing illegal strike actions in the country's mining industry would adversely affect its growth path, employment retention as well as creation agenda and investor confidence (Fin24 2012). Gordhan warned that if investor confidence is undermined, investment from inside and outside the country would be threatened as well (Ibid). Investment can either be threatened in the short-term through mine shutdowns with a possible view to withdrawal of business operations by investors due to a business unfriendly environment (Ernst and Young 2012: 20) or in the long-term due to the reluctance by future possible investors to invest in the country due to an unstable business operating environment characterised by labour unrest (South Africa Chamber of Commerce 2012). All such scenarios have crippling and dire consequences to the development prospects of the country.

From Gordhan's assessment of the crippling strikes, it may be inferred that if flexible labour market conditions lead to labour market unrest which in turn threatens investor confidence and the growth path of the country's economy then labour market rigidity could be the safeguard to boosting investor

confidence from within and without South Africa. After all one of the central issues at the heart of the labour unrest in South Africa's mining industry has been the omission from its labour laws to recognise minority trade unions (Reuters 2012). Labour market rigidity is against the recommendations of Bretton Woods's institutions that prefer labour market flexibility as a route to economic development as already alluded to in this chapter. Lessons from the failed Washington Consensus in Latin America indicate that labour market flexibility might not offer the long-term development goals which developing countries should be aiming for. From this argument, could Gordhan have indirectly admitted that flexible labour market conditions may not be conducive to creating investor confidence for trade purposes? It may be argued that his views appear to suggest so.

Striking mine workers disowned both AMCU and NUM for failing to represent their interests. Nevertheless the position of NUM and AMCU in relation to the Marikana Lonmin mine incident does not undermine the importance of Craven's sentiments which are substantiated by the fact that in March 2006, the International Finance Corporation (IFC) adopted new environmental and social standards which contain new requirements for community health, safety and security; labour conditions; pollution prevention and abatement; integrated social and environmental assessments; and management systems (International Finance Co-operation 2009; OECD 2012). The standards adopt an 'outcomes-based approach' which requires client companies to have in place effective management systems that allow them to handle social and environmental risks as an integral part of their basic operations and business model (International Organisation for Employers 2006). The World Bank's *Doing Business* in its 2012 report also acknowledged the need to change the approach to conducting business with a view to ensuring consistency with ILO Conventions and striking a better balance between labour market flexibility and social protection (including unemployment protection) (*Doing Business 2012: 1. Doing Business*, in its indicators on employing workers, measured flexibility in the regulation of hiring, working hours and redundancy in a manner consistent with relevant ILO conventions. This was done to strike a better balance between labour market flexibility and social protection (including unemployment protection). In *Doing Business 2010*, for example, the indicators were complemented with data on the existence of unemployment protection schemes in cases of redundancy dismissal where workers receive less than 8 weeks of severance pay).

Doing Business's stance comes in the aftermath of an ongoing research which commenced in 2010 and is being conducted by the World Bank Group working with a consultative group which includes labour lawyers, employer and employee representatives, and experts from the ILO, civil society, the private

sector and the Organisation for Economic Co-operation and Development (OECD) (For the terms of reference and composition of the consultative group, see World Bank “Doing Business Employing Workers Indicator Consultative Group” <http://www.doingbusiness.org> (accessed 13 July 2018)). The research is working towards exploring the measurement of worker protection to complement the measurement of the cost to employers of labour regulations (A full report with the conclusions of the consultative group is available at <<http://www.doingbusiness.org/methodology/employing-workers>> (accessed 17 July 2018)). The research has led to the collection of new data on issues related to the minimum wage in 2012. The guidance of the consultative group has provided the basis for several changes in the methodology of calculating the minimum wage ratio in employing workers. The change in the methodology of calculating the minimum wage ratio in employing workers has been effected to ensure that:

No economy can receive the highest score if it has no minimum wage at all, if the law provides a regulatory mechanism for the minimum wage that is not enforced in practice, if there is only a customary minimum wage or if the minimum wage applies only to the public sector. A threshold was set for paid annual leave and a ceiling for working days allowed per week to ensure that no economy benefits in the scoring from excessive flexibility in these areas. Finally, the calculation of the redundancy cost and of the annual leave period for the rigidity of hours index was changed to refer to the average value for a worker with 1 year of tenure, a worker with 5 years and a worker with 10 years rather than the value for a worker with 20 years of tenure (Doing Business 2012: 5).

However, there is a lot of criticism that has been levelled against the DB indicators. Critics have been particularly concerned with the use of the EW index, and in particular the country rankings to guide legal reform, as a benchmark against which to measure progress and a basis for providing financial assistance to developing countries (Lee *et al* 2007: 420). Kitching (2006: 799), Arrunada (2008; 2007: 729), Berg and Cazes (2007) and Lee and McCann (2008: 32), and Djankov (2008: 20) have all challenged the conceptual and methodological foundations of the EW index and broader DB project and deemed them as problematic or unreliable.

The conceptual limitations of the DB project can be argued to stem from its underlying understanding of labour laws, which are grouped together with the other legal measures covered by the index as a form of “business regulation” (Lee *et al*, 2007: 421). This conceptualization of labour standards differs from conventional accounts of their purpose in policy, legal and other discourses, which tend to centre on the social objectives of such standards such as ensuring

justice, protecting workers' well-being and security, or improving the quality of life of workers and their families (Ibid. See also Langille 2005; Murray 2001: 20). Lee *et al* have argued that, "In line with the classification of labour laws as an element of "the business environment", the DB indicators are intended neither to recognize the social objectives of labour regulations, nor to assess the level of protection offered by the domestic standards they cover" (Lee *et al* 2007: 421).

Key concerns have thus been raised to the effect that aside from the ILO's core labour standards, the EW index disregards many of the entitlements contained in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work (The ILO Declaration on Fundamental Principles and Rights at Work was adopted in 1998 and is an expression of commitment by governments, employers' and workers' organizations to uphold basic human values - values that are vital to our social and economic lives). The 2008 DB report claimed that methodological improvements have aligned the EW index with the ILO's Conventions (World Bank Doing Business Report 2008: 68). Lee and McCann carried out an analysis with respect to the international standards on working time, finding the sub-index on "rigidity of hours" to be substantially in conflict with them (Lee *et al* 2007: 421). Also, the 2008 DB report singled out Georgia as a model of labour market regulation (World Bank Doing Business Report 2008: 68), although its labour code has been heavily criticized by the ILO for granting employers an unlimited right to dismiss workers without cause and imposing severe restrictions on trade union action and workers' collective bargaining rights (Lee *et al* 2007: 422). Lee *et al* argued that:

In terms of the overall country rankings, moreover, the EW index generates some striking results that are, in some cases, out of line with the economic outcomes it purports to measure. Because of their deregulated labour markets, countries like Afghanistan, Haiti and Papua New Guinea, for example, earn higher marks on the index than do prosperous economies with low levels of unemployment and high productivity, such as Finland, the Netherlands and Sweden, contradicting the World Bank's claim that more flexible policies are a recipe for high-quality job creation (Ibid).

The ITUC has argued that by discouraging countries from maintaining anything above the bare minimum level of labour market regulation, the DB project undermines the development goals promoted by international organizations, including the World Bank itself (ITUC 2007: 2). Lee *et al*, have revealed that an examination of the "rigidity of hours" sub-index showed it to be broadly out of step with trends in domestic regulation and also to reward substantially deregulated working time regimes (Lee *et al* 2007: 22). McLeod has

argued that the “rigidity of employment” component of the EW index provides no additional information: its only effect, he suggested, was to introduce a bias towards the interests of employers by adding weight to the “hiring”, “firing” and “rigidity of hours” sub-indices (McLeod 2007). Berg and Cazes have pointed to the absence from the EW index of tripartite negotiation and collective bargaining measures, despite their role in encouraging dynamic and responsive labour markets (Berg & Cazes, 2007; Du Marais, 2006). They have also questioned the models of “the business” and “the worker” that are applied to evaluate labour legislation for the purposes of the DB index (On the methodology of the EW index, available at

<http://www.doingbusiness.org/Methodology>

[Surveys/EmployingWorkers.aspx](http://www.doingbusiness.org/Methodology) (accessed 20 August 2018)). Assumptions about “the business” include, for example, that it is a limited liability company; operates in the manufacturing sector; and has 201 employees (Ibid).

In their studies, Palmer, Wedgwood and Hayman (Palmer 2007) and the United Nations Industrial Development Organization (UNIDO) (2008: 33) noted that this model of the firm does not represent the bulk of the private sector in many developing countries, most notably because it misses the micro-enterprises that are characteristic of the informal sector. Kitching, in reference to sub-Saharan Africa, has argued that since the DB project assumes a model of the enterprise atypical of the vast majority of micro and small enterprises, it is unable to offer meaningful information on any growth constraints that may affect these businesses (Kitching 2006: 800). According to Lee *et al*, the image of “the worker” embedded in the index is also open to criticism as reflecting the “standard” model of labour market participation in that he or she is assumed to be 42 years old, engaged on a full-time basis and to have been employed by the same company for 20 years (The twenty years has since been revised to ten years) (Lee *et al* 2007: 423). Fudge and Owen noted that this model of engagement in paid labour hypothesised by DB was alien to many workers and women in particular across the industrialized countries, and it captures only a minority of workers in many developing countries (Fudge & Owens 2006: 30).

Siems (2007) has argued that by comparing countries in which the context of particular rules is completely different, the DB approach did not allow for an assessment of individual countries’ legal systems, thereby undermining the overall ranking system. Bath studied the application of the index to China and Australia established that the restricted scope of the EW index meant that the overall DB index does not provide an accurate picture of “ease of doing business”, thereby restricting its usefulness both for analyses of individual countries and for cross-country comparisons (Bath 2007). Høyland, Moene and Willumsen also questioned whether the EW index accurately captures the employment climate best suited to business and argued that countries may

actually find it easier to shift their rankings in the index than to change their underlying business environment (Høyland *et al* 2008). This supports the suggestion of Menard and du Marais that the DB ranking system is superficial and measures the ability of countries to “fix the rules of the game”. Deakin, Lele and Siems have concluded that the current state of knowledge on the workings of labour legislation does not validate the belief that labour law reform towards deregulation will enable countries to improve their economic performance (Deakin 2007). Villaba (2006) has argued that:

These conceptual and methodological deficiencies of the EW index stand in contrast with the increasing references being made to it within global policy circles, raising suspicion in some quarters that the main motivation behind the EW index is international trade goals – for example, global competition for labour deregulation – rather than questions of national development.

From the above detailed current position assumed by actors in world business, Craven’s views in 2011 strengthen arguments that developing countries’ leaders might be lacking foresight by focusing on quick political gains which do not offer a better long term future for their countries. It must also be accepted though that the lack of foresight amongst developing countries’ leaders could possibly be compounded by the Bretton Woods institutions (Woods 2006: chapter 5; Weiss & Daws 2006: 1. The World Bank and its sister organization, the International Monetary Fund, were created at Bretton Woods New Hampshire in 1944. Together they are referred to as the Bretton Woods Institutions or BWIs. The World Bank is currently the largest multi-national lending and technical agency dealing with Third World development. As the world’s leading development agency, the World Bank has a wide-ranging mandate, from consolidating loans for large-scale development projects to providing structural adjustment loans and sectoral adjustment loans to developing countries experiencing balance of payments problems. The IMF’s original mandate sets forth three main objectives, 1) To promote international monetary cooperation; 2) To facilitate the expansion of international trade; and 3) To promote exchange rate stability. The IMF achieves these objectives by advising member countries on their economic policies and by providing conditional assistance to member countries experiencing balance of payments problems) which incentivize labour market flexibility without paying much attention to the conditions under which workers in developing countries are living in.

In June 2012, Rob Vos, the United Nations Director of Economics indicated that African countries must focus on long term economic gains rather than short term political gains. Vos was adding emphasis on recommendations

made in the 2012 Economic Report on Africa which stressed the need for African countries to focus on investing in human capital (Economic Commission for Africa, 2012: 113) and regional integration (Ibid: 129). As such when one contrasts the current position of South African labour and the statements of some members of the South African government with the initial softer approach of South Africa towards the trade-labour linkage taken at the end of the apartheid era, it can only be argued that the later differences in opinions between the government and the trade unions on the one hand and amongst government officials on the other hand (Mail and Guardian 2011. Government spokesperson Jimmy Manyi had to rush to indicate that the South African Cabinet would not entertain any proposals to relax labour laws. The Cabinet also issued a “tacit rebuke” to Pravin Gordhan for his suggestions that South Africa had to relax labour laws to create more jobs), raises serious questions as to the sincerity of some in the South African government towards realizing sustainable development in the country. On the other hand, one could argue that it signals high levels of ignorance amongst South African trade unions concerning the place of core labour standards in trade and development. An analysis of some of the violations of core labour standards in trade currently taking place in South Africa could help in clarifying which of the two arguments advanced is plausible.

Low Compliance with Core Labour Standards in South Africa’s Wine Industries

South Africa is regarded as having sound labour legislation in the region and the world at large. Sadly, in August 2011 a Human Rights Watch report established that each year, millions of consumers around the world enjoy South African fruits and the well-known wines that come from its vineyards yet the farm workers who produce these goods for domestic consumption and international export are among the most vulnerable people in the South African Society (Human Rights Watch 2011: 4. After the report, the government of South Africa and other stakeholders (business and organized labour) did not taken any action to remedy the poor labour conditions under which employees worked. This has resulted led to illegal strike actions in South Africa’s Western Cape Province’s farming sector strikes (at the time of completing this study). Such unnecessary setbacks, during the harvesting for export purposes could have avoided if timely attention had been given to the workers’ grievances. It must be appreciated that emphasis is not to be placed on giving in to workers entire demands as this may cripple business. The objective is to adopt measures which cushion workers during harsh economic conditions such as those characterizing the world economy at the present moment whilst at the same

time ensuring that no huge salaries have to be imposed upon the employers which would limit investment returns. A balance of interests would be the ideal approach to avoid crippling strike actions such as has become common in South Africa at the time of completing this study. Such an approach could also work elsewhere in today's world). The workers work long hours in harsh weather conditions, often without access to toilets or drinking water and are exposed to toxic pesticides that are sprayed on crops (Ibid). For this physically gruelling work, they earn among the lowest wages in South Africa, and are often denied benefits to which they are legally entitled (Human Rights Watch 2011: 4). It must also be observed that apart from the wine industries, in 2011, the clothing factories in the Western Cape agreed to a minimal entry salary of a miserly R700 with a view to ensuring that South Africa competes against China in the clothing sector). They also face obstacles to union formation, which remains at negligible levels in the Western Cape agricultural sector (Human Rights Watch 2011: 4).

All the labour standards violations continue to occur regardless of the safeguards offered at law for the workers. It is important to observe that the violations of core labour standards at hand are similar to those practiced by Chinese companies. This indicates that the problem goes beyond just being a China issue but an international issue. In that regard, it could be an indication that something beyond national legislation is required to address the violation of core labour standards in trade. An analysis of legal instruments available to protect South African workers in farms from exploitation is thus necessary on the basis that the Social Charter requires national governments to implement measures which will ensure the realisation of its objectives (SADC Social Charter Article 2(1)).

South Africa's Legal Obligations

The 1996 Constitution of the Republic of South Africa is the supreme law of the country (See the Constitution of the Republic of South Africa 1996 (hereinafter referred to as the Constitution) chapter 1 Section 2). It notes that the Bill of Rights “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom” (See chapter 2 of the Constitution section 7(1)). Furthermore it provides that, “the state must respect, protect, promote and fulfil the rights in the Bill of Rights” (See chapter 2 of the Constitution section 7(2)). These rights may be limited only in certain circumstances. See chapter 2 of the Constitution, sections 7(3) and 36). The Bill of Rights guarantees a range of rights for every person in South Africa, as well as certain rights that are restricted to citizens (Rights limited to citizens include political rights, rights to reside in the country, and rights to choose freely their trade, occupation, or profession. See chapter 2 of the Constitution sections 19,

20, 21(3)-(4) and 22). In respect of some of those rights the government must take reasonable measures to achieve their progressive realization (See chapter 2 of the Constitution sections 26(2) and 27(2)). One such right of which the State must ensure a progressive realisation is the broad right to fair labour practices (See section 23(1) of the Constitution).

The South African government has enacted legislation and regulations that are relevant to the rights of farmworkers and farm dwellers. This includes Sectoral Determination 13, which was promulgated by the Minister of Labour to establish basic conditions of employment for farmworkers (See the Basic Conditions of Employment Act (BCEA), No. 75 of 1997. Sections 51-55 of the BCEA enable the Minister of Labour to promulgate Sectoral Determinations to establish basic conditions of employment for workers in a sector and area, excepting sectors in which a collective agreement concluded by a bargaining council or statutory council already exists. Section 57 of the BCEA provides that if a matter is regulated in both the BCEA and the Sectoral Determination, the provision in the Sectoral Determination prevails. Inspectors from the Department of Labour are tasked with monitoring the implementation of Sectoral Determinations and ensuring that employers follow all requirements). The Government of South Africa is obligated to respect, protect, and fulfil the rights enshrined in international and regional instruments it has ratified (The South African government also undertakes not to undermine the object and purpose of treaties to which it is a signatory. See Article 18 of the Vienna Convention on the Law of Treaties 1969 which entered into force on 27 January 1980). The South African Constitution also requires that international law be considered in interpreting the Bill of Rights and legislation (See chapter 2 of the Constitution section 39(1)(b) and chapter 14, section 233). An analysis of some key labour-related rights being violated in the fruit and wine industries of South Africa follows below.

Occupational Health and Safety

As already indicated in the 2011 Human Rights Watch Report, workers in the fruit and wine industries in the Western Cape Province of South Africa, work long hours in harsh weather conditions, often without access to toilets or drinking water and are exposed to toxic pesticides that are sprayed on crops (Human Rights Watch 2011: 4). All this is taking place regardless of the South African Constitution guaranteeing everyone the right “to an environment that is not harmful to their health or well-being” (See Section 24 of the Constitution) and “the right to have access to health care services,” which the government must take reasonable measures to achieve (See Section 27(1)-(2) of the Constitution). Issues concerning the environment are some of the key issues

that have come up for debate before the WTO. The Occupational Health and Safety Act (OHSA) (The Occupational Health and Safety Act No 85 1993), regulates workplace health and safety for workers in all sectors. The OHSA requires employers to provide and maintain a safe workplace (See section 8 of the OHSA). Labour inspectors are tasked with ensuring that employers comply with health and safety regulations (Section 8 of the OHSA). Employers who fail to comply with occupational health and safety regulations may be subject to penalties (Section 43(4) of the OHSA).

Under the OHSA, the Department of Labour has promulgated the Regulations for Hazardous Chemical Substances (See the Department of Labour, Regulations for Hazardous Chemical Substances of South Africa 1995) and the Hazardous Biological Agents Regulations (See the Department of Labour, Hazardous Biological Agents Regulations of South Africa 2001. Note that the general use of pesticides on farms is also governed by the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947) which apply respectively to employers at workplaces where persons may be exposed to hazardous chemical substances or hazardous biological agents. Both sets of regulations require that employers provide employees with information and training, medical surveillance and attention in certain cases, and respiratory protective equipment and protective clothing. The Facilities Regulations (See the Facilities Regulations of South Africa 1990) also promulgated under the OHSA, require that employers provide sanitary facilities and an adequate supply of drinking water. The Compensation for Occupational Injuries and Diseases Act (See the Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993) covers workers' compensation and disability benefits for injuries occurring on the job. Under the Act, employers must either pay into the workers' compensation fund or obtain insurance to fully cover any and all costs due to an injured worker (See sections 83-84 of the COIDA). The Committee on Economic, Social and Cultural Rights has interpreted the International Covenant on Economic, Social and Cultural Rights (ICESCR) (The Economic, Social and Cultural Rights Treaty was adopted by the United Nations General Assembly on the 16th of December 1966 and came into force on the 3rd of January 1976. It commits parties to work toward the granting of economic, social and cultural rights to individuals. Such rights include labour rights) to include:

... preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health

[and] ... the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment (CESCR General Comment No. 14 of the UN Document E/C.12/2000/4).

Freedom of Association

The South African Constitution guarantees the right to freedom of association (See section 18 of the Constitution), and all workers have the right “to form and join a trade union; to participate in the activities and programmes of a trade union; and to strike” (See Sections 23(2) and 23(3)-(5) of the Constitution). In addition, under the International Covenant on Civil and Political Rights (ICCPR) (The International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly on the 16th of December 1966 and came into force on the 23rd of March 1976. It commits its parties to respect the civil and political rights of individuals such as freedom of assembly) and the African Charter on Human and Peoples’ Rights (ACHPR) (The African Charter on Human and People’s Rights also known as the Banjul Charter, was adopted by Organisation of African Unity (which has since been replaced by the African Union) on the 21st of October 1986. It is intended to promote and protect human rights and basic freedoms in Africa.), the South African government is obligated to respect the right to freedom of association (See Article 22 of the ICCPR and Article 10 of the ACHPR). Having ratified ILO Conventions 87 and 98, South Africa has committed to ensure that workers have the right to establish and join organizations of their own choosing and that workers are protected against discrimination based on union activity (See Article 2 of ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise adopted on 9 July 1949 and entered into force on 4 July 1950. See also Article 1 of the ILO Convention No 98 concerning the Right to Organise and Collective Bargaining adopted on 1 July 1949 and entered into force on 18 July 1951 which notes that protection against anti-union discrimination applies particularly “in respect of acts calculated to ... cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities”). The ILO has determined that freedom of association and the right to collective bargaining are fundamental labour principles and rights (See the International Labour Organization, Declaration on Fundamental Principles and Rights at Work 1998). The Labour Relations Act (LRA), a South African statute that formally adopts ILO provisions, prohibits discrimination against employees for exercising their rights of freedom of association (See section 2(1)-(2) of the LRA. No person may do or threaten to do the following: require an employee or person seeking employment to not be or become a member of a trade union; prevent such

person from exercising rights conferred by the Act; or prejudice such person because of past, present, or anticipated trade union membership or participation).

Conditions of Employment

Under the South African Constitution, “everyone has the right to fair labour practices” (See section 23(1) of the Constitution). Under the BCEA (See the Basic Conditions of Employment Act No. 75 of 1997), which governs basic conditions of employment in South Africa, the Minister of Labour has established Sectoral Determination 13 (Basic Conditions of Employment Act: Sectoral Determination 13: Farm Worker Sector, South Africa Regulation 149 2006). Among other things, Sectoral Determination 13 requires that employers pay at least the minimum wage and limits the amount of deductions that employers can make from wages, including no more than 10 percent for food and no more than 10 percent for accommodation (See sections 8(1)(a)-(b) and 8(2)-(b) of Sectoral Determination 13 No 75 1997). It requires employers to provide written particulars of employment (See section 9 of Sectoral Determination 13) and paid annual leave, sick leave, and maternity leave (See sections 21, 22 and 24 of Sectoral Determination 13); regulates the hours of work, including payments for overtime work or work on Sundays and public holidays (See section 10 -20 of Sectoral Determination 13); prohibits child labour and forced labour (See section 13(25) of Sectoral Determination 13); and regulates the termination of employment (See sections 26-31 and 33 of Sectoral Determination 13). The Unemployment Insurance Act (Unemployment Insurance Act (UIA) No. 63 2001) establishes the Unemployment Insurance Fund (UIF) and provides for the government’s payment from the fund of unemployment benefits, maternity benefits, and other benefits (See sections 24-26 of the UIA).

As State Party to the ACHPR, South Africa must recognize and promote work under equitable and satisfactory conditions (See section 15 of the UIA). This encompasses fair remuneration, a minimum living wage for labour, and equal remuneration for work of equal value; equitable and satisfactory conditions of work; and the right to rest and leisure (See Article 6 of the Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa which was incorporated into the Resolution on Economic, Social and Cultural Rights in Africa adopted in December 2004 by the ACHPR). The ICESCR recognizes the right to just and favourable conditions of work, in a similar manner as section 23(1) of the South African Constitution which guarantees fair labour practices to everyone (See Article 7 of the ICESCR). It requires fair remuneration, safe and healthy working conditions, equal

opportunity for promotions, and rest and leisure (See Articles 9, 10 and 11 of the ICESCR). The ILO has also adopted conventions specific to farm workers, such as ILO Convention 129, Labour Inspection (Agriculture), 1969, which covers labour inspections in the agricultural sector. Although South Africa has not ratified these conventions, they provide guidance on international norms regarding hired farm labour (ILO Convention No 129 concerning Labour Inspection in Agriculture 25 adopted June 1969 and entered into force on 19 January 1972. See also ILO Convention 11 concerning the Right of Association and Combination of Agricultural Workers, adopted 12 November 1921 and entered into force on 11 May 1923).

Human Rights Responsibilities of Private Actors

Although governments have the primary responsibility to respect, protect, and fulfil human rights, private entities such as business enterprises also have responsibilities regarding human rights. The basic principle that businesses of all sizes have a responsibility to respect human rights, including workers' rights, has achieved wide international recognition (The preambles to key human rights treaties recognize that ensuring respect for human rights is a shared responsibility that extends to "every organ of society," not only to states. In addition, the preambles of both the ICCPR and ICESCR recognize that "individuals" have human rights responsibilities, a term that can incorporate juridical persons (including businesses) as well as natural persons. The broad consensus that businesses have human rights responsibilities is also reflected in the decisions of the UN Human Rights Council on business and human rights, discussed further below, as well as in the International Labour Organization's Tripartite Declaration of Principles, the UN Global Compact, and elsewhere). This approach is reflected in various norms and guidelines, including in the work of the United Nations Special Representative on business and human rights, Professor John Ruggie, who held the post until June 2011. During his mandate the longstanding concept that businesses have a responsibility to respect all human rights secured additional support, including from the United Nations Human Rights Council (UNHRC) and from business organizations (For example, the International Chamber of Commerce issued a policy statement that reads in part: "Respect for human rights constitutes a baseline expectation for companies operating in any country. All companies, regardless of their size or home country, are expected to obey applicable laws and regulations, including those aimed at protecting human rights. Where national law is absent, or not enforced, companies are expected to respect the principles of relevant international instruments." International Chamber of Commerce, (2008), "Policy statement: ICC views on business and human rights," December 10,

2008. This statement expanded on a joint statement the ICC issued with two other business groupings in May 2008. See “Joint initial views of the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eight Session of the Human Rights Council on the Third Report of the Special Representative of the UN Secretary-General on Business and Human Rights”). In particular, the “Protect, Respect and Remedy” framework and the “Guiding Principles on Business and Human Rights” for their implementation, which were developed by Ruggie and endorsed by the UNHRC in 2008 and 2011 (See the UN Human Rights Council “Mandate of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises,” Resolution 8/7 A/HRC/RES/8/7 and UN Human Rights Council “Human Rights and Transnational Corporations and other Business Enterprises” Resolution 17/4 A/HRC/17/L.17/Rev.1), respectively, reflect the expectation that businesses should respect human rights, avoid complicity in abuses, and adequately remedy them if they occur. Among other elements they outline basic steps that businesses should adopt consistent with their responsibilities. This includes undertaking adequate due diligence that encompasses risk assessments and monitoring in order to identify and effectively mitigate against human rights problems (See the UN Human Rights Council report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises “Protect, Respect and Remedy: a Framework for Business and Human Rights” UN Document A/HRC/8/5 7 April 2008. See also the report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” UN Document A/HRC/17/31 21 March 2011). Moreover, although not specified in the Guiding Principles, it is a best practice among companies, as well as in multi-stakeholder initiatives designed to address business and human rights problems, to require independent third-party audits; some also communicate the results publicly.

Conclusion

It has been shown in this chapter that whilst most Southern African countries have ratified the key ILO core labour standards Conventions and have labour legislations that capture the objectives and essence of those Conventions, workers continue to suffer in trade-related matters. Most SADC countries are reluctant to enforce the labour standards in favour of quick economic gains

without paying much attention to the future as proposed by the 2012 Economic Report for Africa. It is high time that the rights of workers in trade related practices are protected in Africa. Workers must now be seen to benefit from the proceeds of their labour. An impoverished work force is detrimental to Africa's developmental aspirations. African countries must adopt robust strategies to eliminate the exploitation of workers by foreign investors in trade related matters.

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Promoting Economic Transformation and Empowerment and “Investment Security” in Namibia: An Appraisal of the National Equitable Economic Empowerment Framework Bill

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Introduction

Over twenty years into democracy, the systematic disempowerment mechanisms adopted during the apartheid era have led to a contemporary Namibian society in which previously disadvantaged Namibians remain excluded from participating in the country's economic activities. At the core of such socio-economic imbalances have been injustices caused by market mechanisms that fall short of curbing power and economic inequality. Often, political reasoning has appeared to disregard morality as the fundamental principle of economics. The Namibian Parliament recently tabled the National Equitable Economic Empowerment Framework (NEEEF/NEEEB) Bill for consideration by stakeholders and parliament at large. This chapter evaluates the NEEEF Bill's key provisions pertaining to its suitability to promoting equality as well as a sustainable business environment. Lessons will be drawn from the experiences of South Africa and Zimbabwe in applying similar laws.

Governments in the world have traditionally assumed the role of pursuing socio-economic goals (Harambee Prosperity Plan 2016/17 – 2019/20; Fourth National Development Plan of Namibia, 2012/13 – 2016/2017; United Nations Report on the 17 Goals to transform the world (Millennium Development Goals), 2015) and realising socio-economic rights (Articles 16, 22, 24, 25, 26 and 27 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948. See also Articles 1-25 of the International Covenant on Economic, Social and Cultural Rights adopted by the United Nations General Assembly on the 16th of December 1966, and came into force on the 3rd of January 1976) in the best interests of their citizens (United Nations 2008). The Namibian government is not an exception. With over twenty years of independence gone by, the country remains as one of the most unequal societies in the world (World Bank 2016; Jauch *et al* 2012) regardless of it being classified as an upper middle income economy (World Bank 2014; Geingob 2015; Quartz Africa 2015). Many previously disadvantaged persons in Namibia still suffer from the effects of the colonial induced injustices characteristic of

the apartheid era (Sisamu 2015). Not many previously disadvantaged Namibians (For a definition of what constitutes previously disadvantaged Namibians see Article 23(2) and (3) of the Namibian Constitution. The definition also includes persons with any disability as defined in the National Disability Council Act No. 26 of 2004) are participating in the country's economic activities. The status quo is exacerbated by Namibia's reliance on free market policies (The neoliberalism policy and ideology model places significance on free trade. It allows for minimal state intervention in socio-economic affairs and aggressively advocates for the freedom of capital and trade. See Genev 2005: 343; Harvey 2006: 145; Gamble 2014: 10; and Monibot, 2016: 12) which inform corporates' contemporary global business practices. Free market policies pay little or no regard to human rights (Warikandwa & Osode (LDD) 2014: 241; Warikandwa & Osode (CILSA) 2014: 490; Warikandwa 2012). They have been constantly promoted by Bretton Woods Institutions (Bretton Woods Project 2005. The Bretton Woods Institutions refer to the World Bank (WB) and the International Monetary Fund (IMF). They were set up at a meeting of 43 countries in Bretton Woods, New Hampshire, United States of America in July 1944. Their aim was to rebuild shattered post-war economy and promote international economic cooperation) by way of advocating for market regulatory flexibility as a mechanism for promoting what is now known as the ease of doing business (For an understanding of what the ease of doing business index refers to the World Bank's explanation available at <http://data.worldbank.org/indicator/IC.BUS.EASE.XQ> (accessed 26 June 2018)).

The Namibian Government has introduced the New Equitable Economic Empowerment Framework (NEEEF) of Namibia and proposed the 2015 NEEEF Bill as enabling mechanisms for promoting an equitable approach to realising the benefits accrued from property ownership (Article 16 of the Constitution of the Republic of Namibia, 1990(Act No. 1 of 1990) (herein after the Constitution), affirmative action (Article 23(2) of the Constitution), government initiatives aimed at promoting the general welfare of Namibians (Article 95 of the Constitution), implementing principles of economic order (Article 98 of the Constitution), foreign investments (Article 99 of the Constitution) and the exercise of the government's right to sovereign ownership of natural resources (Article 100 of the Constitution). Emphasis in this regard is placed on the Republic of Namibia's Constitution where Articles 23(2) and 95(a) mandate Parliament to enact legislation providing directly or indirectly for the advancement of persons in Namibia. The NEEEF is essentially premised on five pillars of economic empowerment namely: 1) ownership; 2) management control and employment equity; 3) human resources and skills development; 4) entrepreneurship development; and 5) community investment.

The NEEEF Bill and its potential impact on trade and investment in the resource rich Namibia must be investigated in view of Article 99 of the Namibian Constitution which provides that; “Foreign investments shall be encouraged within Namibia subject to the provisions of an Investment Code to be adopted by Parliament”. The investigations into the practicality of the NEEEF Bill and its sustainability are informed by the basic ideology behind the law and economics school of thought. The law and economics school of thought places emphasis on ascertaining the cost implications of introducing any new laws and policies to the economy (Mercuro, 2009). The law and economics school of thought is defined as the, “... application of economic theory, primarily microeconomics and the basic concepts of welfare economics, to examine the formation, structure, processes, and economic impact of law and legal institutions”). Scientific evidence obtained from experiences of South Africa and Zimbabwe in employing indigenisation policies and/or law, reveals that investors are likely to withdraw their capital investments from countries that impose rigid economic empowerment regulations which threaten their investments. The withdrawal of investments is not informed by the fact that indigenisation does not work but that Europe and Asia is not ready to let Africa run its own economies because they benefit from exploiting the continent’s natural resources. Nevertheless, practical lessons will be drawn from the experiences of South Africa and Zimbabwe in so far as implementing indigenisation laws is concerned.

Taking into consideration that corporates have taken over part of the traditional responsibility that government had to realise countries’ socio-economic needs through Corporate Social Responsibility (The United Nations (UN) has come up with principles for promoting corporate social responsibility (CSR). The rules are called, “The Ten Principles of the UN Global Compact”. The ten principles are derived from the Universal Declaration of Human Rights, the UN Convention against Corruption, the International Labour Organisation’s Declaration on Fundamental Principles and Rights at Work and the Rio Declaration on Environment and Development. The rules are as outlined follows: i. Human Rights (Principle 1: Business should support and respect the protection of internationally proclaimed human rights; and Principle 2: Business should make sure that they are not complicit in human rights abuses); ii. Labour (Principle 3: Businesses should uphold the freedom of association and effective recognition of the right to collective bargaining; Principle 4: the elimination of all forms of forced and compulsory labour; Principle 5: the effective abolition of child labour; and Principle 6: the elimination of discrimination in respect of employment and occupation; iii. Environment (Principle 7: Business should support a precautionary approach to environmental challenges; Principle 8: undertake initiatives to promote

greater environmental responsibility; and Principle 9: encourage the development and diffusion of environmental friendly technologies; and iv. Anti-Corruption (Principle 10: Businesses should work against corruption in all forms, including extortion and bribery. For further discussions on the role of companies in promoting CSR see Valente & Crane 2010: 52; Jamali & Mirshak 2007: 243; Buhmann 2006: 188; The South African King I Report on Corporate Governance which came into effective in November 1994; The South African King II Report on Corporate Governance which came into effective in March 2002; The South African King III Report which came into effective in March 2010; and The South African King III Report which came into effective in March 2016), it shall be analysed whether the NEEEF Bill is necessary since corporates are already paying taxes and funding community development projects in Namibia (Anonymous 2016: 16; Skorpion Zinc 2014-2015: 28, 37 and 47; Namibian Uranium Association Annual Review 2014/2015: 16; Chamber of Mines of Namibia Annual Review 2015: 116, 117). Further, investors are operating in harsh global economic environments with governments expected to cushion rather than encumber them.

It is necessary to point out that policies such as the NEEEF are not unethical. Their justification at law can be found in two leading cases of *De Sanchez v Banco Central de Nicaragua* (*De Sanchez v Banco Central de Nicaragua* 770 F.2d 1385 US Court of Appeals 5th Cir September 19 1985 at para 17) and *AMCO v Indonesia* (*AMCO v Republic of Indonesia (Merits)* 1992 89 ILR 368 at paragraphs 405 and 466) where the courts emphasised countries' customary international law right to regain ownership of industries as part of their territorial and economic sovereignty. Implicit in the findings of the courts is the ideological construction that a substantial foreign ownership of national resources and/or business sectors threatens national and economic sovereignty (Leal-Arcas, 2010: 178). Some authors have counter argued that since countries have already ceded their national and economic sovereignty to the multilateral legal order by virtue of agreeing to be bound by international agreements which regulate free market policies, economic sovereignty should be negated (De Almeida 2013: 471; Bhagwati 2002: 128; Bagwell & Staiger 1999; Drezner 2001: 321; and Raustiala 2003: 841). It becomes evident that views regarding the implementation of indigenisation policies are polarised.

In pursuing its thesis, this chapter will be divided into eight parts. The first part introduces the thesis of this chapter. The second part offers a background to the implementation of the NEEEF policy and outlines the related economic order that necessitated the adoption of mechanism to promote equality in the participation of Namibians in the country's economic activities. Part three points out the current challenges being experienced in Namibia owing to the existent inequalities relating to participating in the country's economic activities.

Part four analyses the key provisions of the NEEEF Bill as informed by the NEEEF whereas Part five draws lessons from South Africa and Zimbabwe’s experiences. Part six points out how the adoption of the NEEEF Bill could change the existing law and practice in the business sector of Namibia. Part seven offers recommendations and part eight concludes the thesis of the paper.

Background

Inequality in the world is a common contemporary problem governments are seized with (Yule 2012: 18-19; Stiglitz 2012). Over twenty years into Namibia’s democracy, the country still has one of the highest inequality ratios in the world. The inequality ratios are measured by the Gini Coefficient (Dorfman 1979: 146-149. The Gini Coefficient is described by Dorfman, “...as a conventional and well established ad hoc measure of income inequality.” See also the UNDP Human Development Report 2015). The Gini Coefficient measures the income distribution of a country’s residents. Contemporary statistical data of Namibia’s Gini Coefficient is illustrated in table 1 below:

Table 1: Namibia’s Income Ratios and Gini Coefficient (1995 - present)

UN R/P		World Bank Gini		CIA R/P		CIA Gini	
10%	20%	%	Year	10%	Year	%	Year
106.6	56.1	61.3	2010	129.0	2003	59.7	2010

- Key:**
- R/P 10%:** The ratio of the average income of the richest 10% to the poorest 10%
 - R/P 20%:** The ratio of the average income of the richest 20% to the poorest 20%
 - Gini:** Gini index, a quantified representation of a nation’s Lorenz curve
 - UN:** Data from the United Nations Development Programme.
 - CIA:** Data from the Central Intelligence Agency’s The World Factbook.

The trends indicated in the table 1 above are attributed to three key factors which are: 1) the systematic disempowerment mechanisms adopted during the apartheid era; 2) the unequal distribution of resources after the adoption of government policy initiatives such as the Mining and Minerals Policy of 2002, with the well-connected elite benefiting from the programmes; and 3) injustices caused by neoliberal market regulatory mechanisms that fall short of curbing power and economic inequality (The neoliberalism policy and ideology model places significance on free trade. It allows for minimal state intervention in

socio-economic affairs and aggressively advocates for the freedom of capital and trade. See Monibot 2016: 12; Warikandwa & Osode (*Speculum Juris*) 2014: 41; Harvey 2006: 145; Gamble 2014: 10; and Genev 2005: 343). Political reasoning has appeared to disregard morality as the fundamental principle of economics. Mechanisms have to be employed to curb the continued marginalisation of ordinary and previously disadvantaged persons from participating in Namibia's economic activities. This chapter proceeds from the premise that tabling of the NEEEF Bill before parliament is a plausible and deliberate attempt by the Namibian Government to realise greater success in meeting policy goals of the multi-faceted economic transformation and empowerment of previously disadvantaged Namibians. The next section of this paper thus seeks to evaluate the NEEEF Bill's key provisions pertaining to its adequacy in attempts to address issues of equality at the same time promoting investment security in the resource rich Namibia.

The NEEF Bill

The NEEEF Bill has drawn polarised views regarding its suitability for Namibia's economy. The business community has branded it counter-productive as it does not promote the ease of doing business by virtue of providing that business should cede 25% of their shares to locals (Shinovene, 2016: 3). At the centre of the private sector business owners' argument is the role of free market policies which if limited by regulatory rigidity will cause disinvestment or the withdrawal of capital investments as is currently the case with South Africa and Zimbabwe. On the other hand, previously disadvantaged persons see the NEEEF Bill as a progressive government initiative to redress the colonially induced imbalances (The NEEEF Bill is consistent with the Namibian Constitution's provisions in Article 23(2)-(3) and Article 95(a) which mandate the Namibian Parliament to enact legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically and educationally disadvantaged by past discriminatory practices amongst other things. The SWAPO Party Youth League have even proposed that the equity threshold for ownership should be increased from the proposed 25% to 35%). In its preamble, the NEEEF Bill points to the existent and persistent inequalities in incomes, ownership of assets, low level of participation in the economic mainstream by previously disadvantaged persons, high levels of unemployment, and racial imbalances in the control of private sector enterprises.

In its definitional section, the NEEEF Bill significantly draws attention to the need to address the potential challenges of fronting practices. The efficacy of the NEEEF in delivering the intended policy outcomes might be steadily

retarded by unethical business conducts and malpractices such as business fronting. Fronting in the NEEEF Bill is regulated in a combination of three ways focusing on: (a) definition, (b) monitoring, and (c) consequences. Fronting has often been used as a token of superficial inclusion of historically disadvantaged persons into mainstream economic activities with no actual transfer of wealth or control (Mebratie & Bedi, 2011; Warikandwa & Osode 2017). The provisions of the NEEEF Bill are intended to provide authoritative guidance as to what fronting is and hopefully prescribe deterrent measures against those who violate its provisions. This Part examines the definitional issues relating to fronting and the potential impact of the NEEEF Act if passed into law, in this regard.

The Definition of “Fronting” in the NEEEF Bill

The legislature has adopted a dual-faceted definition in section 1(j) of the NEEEF Bill. In assessing that definition for technical soundness and prospective regulatory efficacy, it is plausible to note that there are three possibilities or models in terms of approaches to statutory definitions of key terms. The legislature may: (a) adopt a broad, elastic, open-ended, and catch-all definition (usually accompanied by an element of vagueness); (b) employ a closed-list or an open-list of practices or conduct or situations falling within the regulatory scheme; or (c) adopt a combination of the above two approaches.

First facet of definition: General description of what constitutes fronting

A holistic definition of fronting is envisaged for the NEEEF Act in order to address matters related to the many forms of fronting in that could potentially occur in Namibia. In this regard the NEEEF Bill offers a modest outline of what fronting could be. Clearly the legislative and policy intention is to eliminate the known and perceived weaknesses in the current regulatory framework policies regarding the pursuit of economically empowering previously disadvantaged persons in Namibia. Section 1(j) of the NEEEF Bill adopts a broad or general definition when it declares a ‘fronting practice’ as: “a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act, including but not limited to practices with an empowerment initiative” (See section 1(j) of the 2016 NEEEF Bill. Section 1(j) mirrors section 1(e) of the South African Broad-Based Black Economic Empowerment Amendment Act 46 of 2013 which defines fronting as any “transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of the

B-BBEE Act, including but not limited to practices in connection with the B-BBEE initiative...”).

The interpretation-related challenges which are likely to result from the element of vagueness inherent in a broad definition of “fronting” are certain to be mitigated by the second facet of the definition of “fronting” in the NEEEF Bill which explicitly identifies certain specific conducts as constituting fronting. This part of the definition section 1(j) declares ‘fronting practice’ as:

...including but not limited to practices” connected with an empowerment initiative -

a) “in terms of which previously disadvantaged persons who are appointed to a private sector enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise”; or

b) “in terms of which the economic benefits received as a result of the compliance status of a private sector enterprise do not benefit previously disadvantaged persons in accordance with applicable economic empowerment targets”

c) Involving the conclusion of a legal relationship with a previously disadvantaged person to enable a private sector enterprise to achieve compliance status without granting such previously disadvantaged person the economic benefits that would reasonably be expected to be associated with the status or position held by that disadvantaged person; or

d) Involving the conclusion of an agreement with another private sector enterprise in order to achieve or enhance the compliance status of a private sector enterprise in circumstances in which -

i. The identity of suppliers, service providers, clients or customers are not sufficiently disclosed to assess the latter enterprise’s compliance status;

ii. The maintenance of business operations is reasonably considered to be improbable, having regard to the resources available; or

iii. The terms and conditions were not negotiated at arm’s length or on a fair and reasonable basis” (Sections 1(j) (a)-(d) mirror sections 1(e)(a)-(d) of the South African Broad-Based Black Economic Empowerment Amendment Act 46 of 2013. For instance, section 1(e)(c) provides that fronting includes practices in connection with a B-BBEE initiative: “involving the conclusion of a legal relationship with a black person for the purpose of the enterprise achieving a certain level of B-BBEE compliance without granting the black person economic benefits.” Lastly, Section 1(e)(d) provides that fronting includes practices in connection with a B-BBEE initiative: “involving the conclusion of an argument with another enterprise in order to achieve or enhance B-BBEE status in circumstances in which i) there significant limitations on the identity of suppliers...ii) maintenance of business operations ...is reasonably considered

improbable and iii) the terms and conditions were not negotiated...on a fair and reasonable basis”).

This part of the definition commendably attempts to go beyond the broad/general description of “fronting” provided in the first part of section 1(j). It is especially significant that the legislature in section 1(j) used the words “including but not limited to”. The use of these words raises an important aspect regarding the character of definitions sometimes adopted by the legislature. Where drafters of regulatory legislation are faced with the challenge of constructing a definitional net that will capture particular forms of misconduct, they usually adopt two types of definitions, the ‘inclusive’ and ‘exclusive’. The ‘inclusive’ definition aims to specifically cover all the known forms of the relevant conduct or practice while leaving space for both regulators and adjudicators to bring within the ambit of the definitional provision forms or manifestations of the conduct or practice that were unknown at the time of drafting, debating and enacting the particular legislation (*N.D.P. Namboodripad v Union of India* (2007) 4 SCC 502. See also *Hamdard (Waks) Laboratories v Deputy Labour Commissioner* (2007) 5 SCC 281). An ‘exclusive’ definition on the other hand provides an exhaustive meaning or ‘closed list’ in relation to a term and does not permit any meaning or the inclusion of anything that is not expressly captured in its wording (*Bharat Cooperative Bank (Mumbai) Ltd. v Employees Union* (2007) 4 SCC 685. See also *Himalayan Tiles and Marble (P) Ltd v Francis Victor Continbo* (1980) 3 SCC 223).

Therefore, whilst on the face of it the part of the fronting definition which identifies certain specific conducts or practices as “fronting” may appear not to be exhaustive, the use of the words “including but not limited to” suggests that the definition is ‘inclusive’ and, therefore, inherently elastic. When a definitional provision uses the said words, it is *prima facie* extensive and enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the provision expressly includes (*Dilworth v Commissioner of Stamps (Lord Watson)* (1899) AC 99. See also *Mahalakshmi Oil Mills v State of A.P.* 1989 AIR 335).

Strengthening the Monitoring and Evaluation of Compliance with the NEEEF Bill

The NEEEF Bill creates an Economic Empowerment Commission (Commission) (Section 13 of the NEEEF Bill) which will effectively act as an ombudsman for matters relating to the NEEEF (See section 16 of the NEEEF Bill. The provision is similar to section 8 of the South African B-BBEE AA. Under this provision, section 13B is inserted into the B-BBEE Act to provide for the establishment and status of the B-BBEE Commission). The

Commission will be established as a juristic person charged with the responsibility of providing oversight to the economic empowerment process and has the duty to: oversee, supervise and promote adherence with the NEEEF Act should it the NEEEF Bill be passed into law (Section 16(1)-(5) of the NEEEF Bill). This commission is the institutional focus of the NEEEF Bill changes which if well implemented could provide stronger leadership to the economic empowerment process, which has historically been sorely lacking in Namibia.

The functions of the Commission will include overseeing general compliance with the NEEEF Act, the making of determinations regarding fronting practices in economic empowerment transactions, receiving and investigating complaints relating to the NEEEF Act, maintaining a registry of major economic empowerment transactions and promoting the advocacy of economic empowerment initiatives (See section 16(1)(a), (d), (f), (h) and (i) of the NEEEF Bill). The NEEEF Bill arms the Commission with powers which include the power to investigate into economic empowerment compliance and contraventions (See section 16(1)(f)). The establishment of this Commission provides a new strategy of heavily policing the economic empowerment verification in future and businesses will have to ensure that their economic empowerment policies and especially ownership structures are in line with the objectives of the NEEEF Act should it be passed into law.

Offences and Penalties

The NEEEF Bill makes provision for a number of offences and associated penalties (See sections 37 and 38 of the NEEEF Bill, titled “Offences in connection with Commission” and “Other offences and penalties”). It creates an offence for intentional misrepresentation of information for purposes of securing a favourable economic empowerment compliance status, providing false information to a Government body and failure by a procurement officer or other official of a government body to report any offence in terms of the NEEEF Act (Section 38(c) and 38(2) of the NEEEF Bill). The NEEEF Bill also prescribes the imposition of stiff penalties on persons found guilty of any offence under the Act. A person convicted in terms of the Act could be liable to a fine or imprisonment of up to ten years (Section 38(3) (a)). In respect of juristic persons, the quantum of the fine could be fixed at up to a maximum of ten percent of such juristic person’s annual turnover (Section 38(3) (a)). It is only time that will tell whether or not the definition of “fronting” in the Amendment Act will provide maximum deterrence against fronting and related malpractices.

Lessons from Zimbabwe and South Africa

Black economic empowerment programmes in Zimbabwe and South Africa have often seen the indigenous people who were previously and who remain largely excluded from the economic mainstream going into a state of euphoria based on the genuine belief that such programmes are an effective panacea for their existential socio-economic challenges (Ngwerume & Massimo 2014: 4. See also Matunhu, 2012: 5; Zimbabwe Environmental Law Association, 2011; Mabhena & Moyo, 2014: 72; and Zikhali, Ncube & Tshuma, 2014: 27). This belief appears to be affirmed by the values set out in the African Charter on Human and People's Rights (See Article 21(1) as read with Article 22(1)), which recognise and advance the right to the free disposition of wealth and natural resources, in the best interests of indigenous peoples (Andreasson, 2010: 424. See also the case of *AMCO v Republic of Indonesia (Merits)*: paragraphs 405 and 466; *De Sanchez v Banco Central de Nicaragua* 770 F.2d 1385 US Court of Appeals 5th Circuit, September 19 1985 for a comparative analysis of similar practices in other jurisdictions in the world). It is thus not surprising to see that indigenisation in Zimbabwe and South Africa is founded on a socio-political creed that land and mineral resources exist in the country's territory solely for the benefit of indigenous people (Previously, section 2(1)(b) of the Zimbabwean Indigenisation and Economic Empowerment Act [Chapter 14:33] (Herein after IEEA) of 2007 provided that: "indigenous Zimbabwean" means any person who, before the 18th April, 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest". The provision has since been amended by the Emmerson Mnangagwa government in an irrational bid to attract western "investors". This provision, as it then was, had to be read together with section 14 and section 20(1)(c) of the Zimbabwean Constitution Act 20 of 2013 in order to realise its mischief of economically empowering previously disadvantaged and still disadvantaged Zimbabwean indigenes. Section 1 of the South African Broad-Based Black Economic Empowerment Act (B-BBEE Act) 53 of 2003 provides that: "black people" is a generic term which means African, Coloureds and Indians". In the same section of the B-BBEE Act, it further provided that "broad-based economic empowerment" means the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies..." As such, it is evident that the understanding of indigenous people in Zimbabwe and South Africa is often limited to black people and is deliberately intended to exclude whites as they are generally regarded as being

part of the imperialist regime that usurped resources from the black majority. This view is not accurate regarding all white people though as they also need to be empowered as part of the well-meaning citizens of Zimbabwe and South Africa) and not multinational corporations (Leal-Arcas, 2010: 178. See also Munyedza, 2011: 9). This section will draw lessons of the challenges of implementing indigenisation laws in Zimbabwe and South Africa.

Zimbabwe

The Zimbabwean colonial government, as was the case in Namibia, utilised deliberate and systematic disempowerment mechanisms which led to the exclusion of indigenous Zimbabweans from the economic mainstream (Moyo 2011: 493; Moyo 2011 (Review of African Political Economy): 257; Makwiramiti 2011). As a result, the ushering in of a new political dispensation in 1980 generated a lot of expectations especially among the indigenous persons who wished for the reversal of inequalities inherited from the era of colonial rule (Clarke 1980: 15). The Zimbabwean government has introduced legislative and policy initiatives aimed at addressing colonially induced imbalances thus increasing previously disadvantaged indigenous persons' access to national resources and participation in the economic mainstream, added to facilitating business control or ownership (Clarke 1980: 15. For instance, immediately after independence in 1980, there were a plethora of legislative and policy initiatives by the government to acquire millions of hectares of land from the white commercial farmers in order to redistribute to the indigenous citizens. See generally Moyo 2013). The Indigenisation and Economic Empowerment Act (IEEA) is one such contemporary measure introduced by the government to address the economic imbalances and its policy objectives are to: 1) economically empower indigenous Zimbabweans (See section 2(1) of the IEEA regarding the definition of an indigenous Zimbabwean before its amendment in 2018) by increasing their participation through economic expansion, and growing their productive investment in the economy so as to create more wealth for poverty eradication (Section 3(1)(a) of the IEEA); 2) create conditions that will allow the disadvantaged Zimbabweans to participate in the economic development of their country and earn themselves self-respect and dignity (Section 3(1)(a)-(g) and 3(2)(a)-(b) of the IEEA); 3) develop a broad-based domestic private sector that is the engine of economic growth and development in a growing market economy (See section 3(1)(a)-(g) and 3(2)(a)-(b) of the IEEA); and democratise ownership relations in the economy and eliminate racial differences arising from economic disparities (See section 3(5)-(6) of the IEEA. See also the IEEA's for a specific outline of its intent and objectives). The IEEA provides for a need for indigenisation in the resource and non-resource based sectors (Section 3(5) of the IEEA provides that: "The line

minister may prescribe that a lesser share than fifty-one per centum or a lesser interest than a controlling interest may be acquired by indigenous Zimbabweans in any business in terms of subsections (1)(b)(iii), (1)(c)(i), (1)(d) and (e) in order to achieve compliance with those provisions, but in so doing he or she shall prescribe the general maximum timeframe within which the fifty-one per centum or the controlling interest shall be attained”).

The Indigenisation Economic Empowerment (IEE) General Notice 114 of 2011 provides for indigenisation in the mining sector by requiring that businesses operating in the sector to dispose 51 percent equity to designated entities. The indigenisation policy as reflected in the IEEA unambiguously insists that all foreign-owned companies with a share capital above US\$500 000 operating in Zimbabwe are to cede 51 percent of their shares or interest therein to indigenous Zimbabweans (See section 3(1) of the IEEA). Further, a number of economic sectors have been reserved for indigenous Zimbabweans (These reserved economic sectors include the following: agricultural production of food and cash crops; transport (buses, taxis and car hire services); retail and wholesale trade; barbershops; hairdressing and beauty salons; employment agencies; estate agencies; valet services; grain milling; bakeries; tobacco grading and packaging; tobacco processing; advertising agencies; milk processing; provision of local arts; marketing and distribution. See section 3, 4 and 5 of Statutory Instrument 66 of 2013 [CAP 14:33 IEE (General) (Amendment) Regulation, 2013 (No.5). See also the National Indigenisation and Economic Empowerment Board website available at <http://www.nieeb.co.zw/index.php/sectors/reserved-sectors> (accessed 02 July 2018)). By implication, there shall be no non-indigenous business which will be allowed to invest in the reserved sector unless under special circumstances as determined by line Ministries and approved by Zimbabwe’s Cabinet. The current sector specific compliance provisions are set out as follows:

Table 2: Sector Compliance Provisions as Provided by Enabling Regulatory Instruments

Sector	Minimum net asset value	Lesser share of non-indigenous businesses	Years to comply
Indigenisation and Economic Empowerment General Notice 459 of 2011			
Manufacturing	Of or above one hundred dollars (\$100 000)	26%	1st year
		36%	2nd year
		46%	3rd year
		51%	4th year
Indigenisation and Economic Empowerment General Notice 280 of 2012 – Other Sectors			
Financial Services	See Part I of Notice 280	51%	1 year
Tourism	See Part II of Notice 280	51%	1 year
Education and Sport	See Part III of Notice 280	51%	1 year
Arts, Entertainment and Culture	See Part IV of Notice 280	51%	1 year
Engineering and Construction	See Part V of Notice 280	51%	1 year
Energy	See Part VI of Notice 280	51%	1 year
Services	See Part VII of Notice 280	51%	1 year
Telecommunications	See Part VIII of Notice 280	30-51%	1 year
Transport and motor Industry	See Part IX of Notice 280	51%	1 year

Source: Government of Zimbabwe IEE General Notices 459 of 2011 and 280 of 2012

To realise the IEEA's set objectives, in 2013, the government of Zimbabwe crafted an economic blueprint, the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZIMASSET) with a view to achieving sustainable economic growth and development as well as social equity, *inter alia*, anchored on indigenisation, empowerment and employment creation (See the ZIMASSET, October 2013 - December 2018) (See the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZIMASSET), October 2013 – December 2018). Chapter 3 of the ZIMASSET states that the blueprint is also expected to consolidate the gains and opportunities brought by the indigenisation policy and increase Foreign Direct Investment (FDI), among other things. In the main, the implementation of the IEEA has seen a significant decline in FDI. The objectives of the ZIMASSET explicitly seek to further the

indigenisation programme as well as grow FDI. Zimbabwe is a mineral rich country with an abundance of diamond, gold and platinum deposits amongst other mineral resources. Such minerals attract resource-seeking investors. It is therefore not surprising that between 1990 and 1999, Zimbabwe attracted FDI estimated at United States Dollars (USD) 950 million (See the Reserve Bank of Zimbabwe First Quarter Monetary Policy Statement, April 2014. See also the Government of Zimbabwe's ZIMSTATs for 2012, 2013 and 2014). However, critics have said that the ZIMASSET is not implementable within a short period of time due to the financial challenges facing the country (Zimbabwe Broadcasting Corporation, 2015). A clear indicator of these financial challenges is the significant decline in FDI from USD 950 million, in the period 1991 to 1999, to USD 400 million between 2000 and 2011 (See the Reserve Bank of Zimbabwe First Quarter Monetary Policy Statement, April 2014. See also the Government of Zimbabwe's ZIMSTATs for 2012, 2013 and 2014). This indicates a decline in FDI by USD 550 million. In effect, between 2000 and 2011, FDI in Zimbabwe measured a negative real economic growth rate averaging 5% (Index Mundi 2014; Sikwila 2015: 1-12; Manda 2014: 82-99). However, it must be understood that the narrative behind the incompatibility between FDI and indigenisation policies and laws is a neo-liberal economic agenda meant to resist African countries' economic independence. It is submitted that the neo-liberal economic order driving global economic policies is not sensitive to African countries' developmental agenda (Warikandwa & Osode (*Speculum Juris*) 2014).

Western and Asian countries investing in Africa have immensely benefitted from the exploitation of the Africans' natural resources to such an extent that their economies are sustained by such activities. As such, any attempts to indigenise or decolonise African economies have often been rebuffed on the grounds that such policies are not economically sound as they threaten foreign investments and are therefore unsustainable (Tuck & Yang, 2012). In the context of Zimbabwe, it must be observed that the country's implementation of the indigenisation policy and laws (which led to the country's investments and economy declining) coincided with the sanctions imposed on the country by western countries for human rights violations attributed to Mr Robert Mugabe's government (See the Zimbabwe Democracy and Economic Recovery Act, 2001; News24, 2018). It is thus evident that any country that dares to decolonise and emancipate itself from the vice-grip of capitalist exploitation will be made to pay for such a policy initiative. This is not to suggest that decolonisation or indigenisation of African economies does not work. Burkina Faso under the leadership of the late Thomas Sankara proved that indigenisation of African economies is practical. Under Sankara, Burkina Faso was able to grow its economy and pay all its debts to western lending institutions such as the

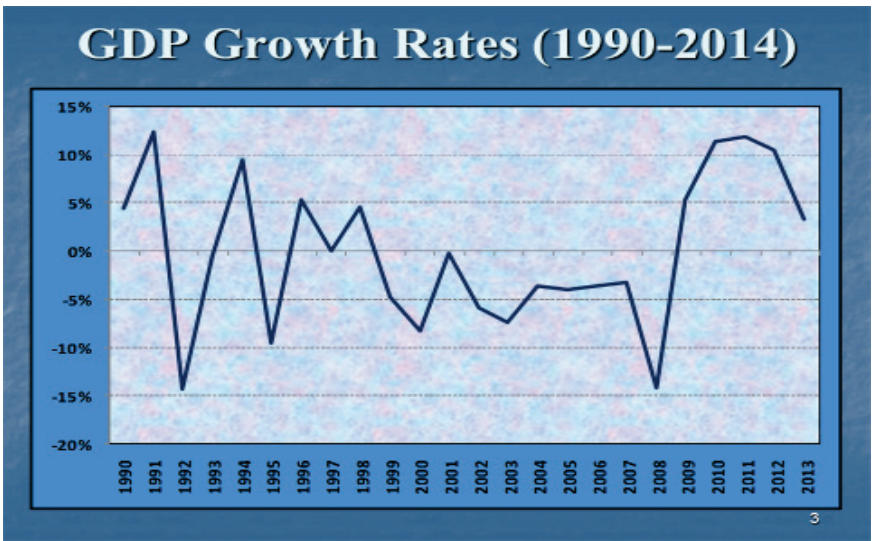
World Bank and the International Monetary Fund. Sadly, after his valiant efforts, Thomas Sankara was assassinated and replaced by a western apologetic leader, Blaise Compaore. In principle, any African leader who dares to wean off their country from western dependence is eliminated physically or from power. A recent and prime example of such phenomenon in Africa is Mr Robert Mugabe, the former President of Zimbabwe who was ousted from power through a *coup de tat* orchestrated by the new leader of the country Mr Emmerson Mnangagwa (a Blaise Compaore like character) and the Zimbabwe Defence Forces (Warikandwa, Nhemachena & Amoo 2018). It is thus evident that the west has an agenda to under develop Africa through resisting any viable home grown economic policies that serve to the best interests of African indigenes (Rodney 1973; Kah 1992, Tandon 2015, Nhemachena & Warikandwa 2017; Warikandwa, Nhemachena & Mtapuri, 2017; Warikandwa, Nhemachena & Amoo, 2018). It is thus not surprising that the western driven free market policies, which incorporate concepts such as FDI, are antagonistic to processes of decolonisation and/or indigenisation. As such, table 3 as well as Figure 1 and 2 below provide evidence of the palpable and anticipated negative impact of the IEEA on FDI.

Table 3: Current account (percentage of Zimbabwe's Gross Domestic Product at current prices)

	2006	2011	2012	2013	2014	2015	2016(e)
Trade balance	-7.7	-28.7	-23.5	-23.1	-23.7	-17.9	-19.3
Exports of goods	28.3	40.3	30.7	27.4	27.2	23.9	23.9
Imports of goods	36.0	69.0	54.1	50.5	50.9	41.8	43.1
Services	-2.0	-6.9	-7.0	-6.9	-5.6	-5.0	-3.2
Factor income	-5.1	-8.3	-7.7	-7.5	-7.5	-7.2	-6.6
Current transfers	7.2	14.0	13.5	12.1	13.7	12.3	11.8
Current account balance	-7.6	-29.8	-24.6	-25.4	-23.1	-17.8	-17.2

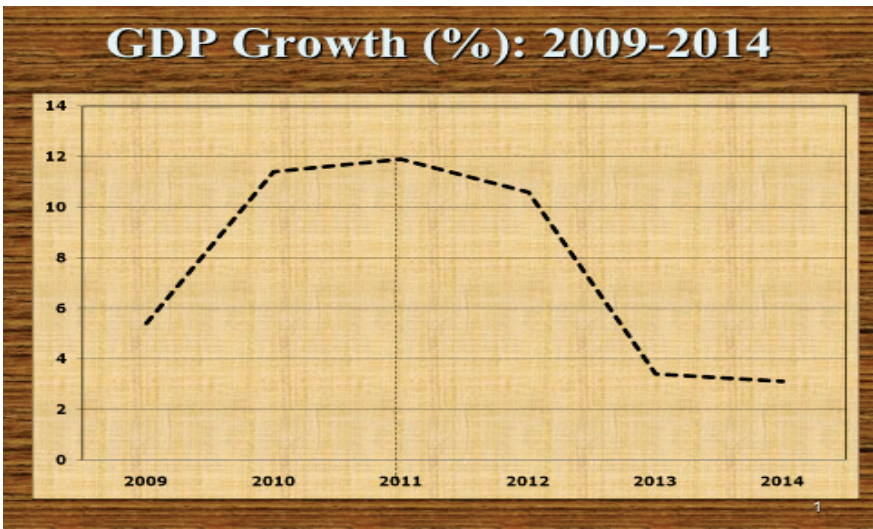
Source: African Economic Outlook 2015; (e) estimates

Figure 1: Zimbabwean GDP Growth Rates (1990-2014)



Source: Reserve Bank of Zimbabwe Monetary Policy Statement 2014

Figure 2: Zimbabwean GDP Growth (%) 2009-2014



Source: Reserve Bank of Zimbabwe Monetary Policy Statement 2014

It is without doubt that within the Zimbabwean government there have been divided views over the need to attract FDI. The former Minister of Youth, Indigenisation and Economic Empowerment, Mr Patrick Zhuwao steadfastly objected to attracting FDI in favour of promoting an exclusively indigenisation agenda (Mutori & Paradza, 2016). Is there merit in former Minister Zhuwao’s

stance? Addressing this question requires reference to be made to contemporary debates advanced regarding the benefits of FDI to African countries. At the centre of these debates are concerns regarding the value addition of FDI investments from the Western investors as opposed to their Asian counterparts, in particular China (Keenan 2009). FDI must translate to a transfer of property to the host country and grow economies (Sornarajah 2010: 8; Makova 2010: 38; Zhang 2001: 175; Olofsodotter 1998: 534; De Mello 1999: 133; and Borensztein *et al* 1998: 115). However, there appears to be a general realisation in Africa that Western investors are reluctant to grow African economies whereas Asian investors especially those from China have through FDI driven economic growth and infrastructure development (Edinger & Jansson 2008: 4-6. China has used the R41, resource for infrastructure contracts with Angola with significant infrastructure development being observed in Angola. The Western investors were reluctant to invest in a country which had been destroyed by war yet it was resource rich. The story of Angola today is now slightly different due to the China-Angola R41 resource for infrastructure investment contract. However, questions have also been raised regarding Chinese companies' exploitative business practices in Africa. See Warikandwa & Osode 2016). This is the perspective that Minister Zhuwao held in his steadfast pursuit of an ultra-indigenisation agenda that, on the face of it, is not entirely FDI responsive. Contrary to Minister Zhuwao's arguably anti-FDI stance, Zimbabwe's former Minister of Finance, Patrick Chinamasa pronounced that there was need to introduce:

Frameworks, templates and procedures for implementing the indigenisation policies in a manner that both promotes investment and eliminates discretionary application of the law. Such measures will contribute immensely towards the ease of doing business in the country and will render the services sector of our country conducive for Foreign Direct Investment (Chinamasa 2015).

Minister Chinamasa's pronouncement also appeared to be an attempt at reconciling differences between the government of Zimbabwe, the International Monetary Fund and the World Bank, due to the implementation of the IEEA (New Zimbabwe 2015). At the time, Minister Patrick Chinamasa's views appeared to have been augmented by the former President of Zimbabwe Mr Robert Mugabe's public pronouncements regarding the need to implement indigenisation laws in a manner that does not frustrate foreign investors, especially those in the banking sector (Herald Zimbabwe 2016).

The major obstacle to the success of the IEEA lies in the manner in which it has been implemented (The Zimbabwean 2014). Empirical evidence shows that since the inception of the IEEA there have been considerable FDI outflows

and dwindled FDI inflows in Zimbabwe (Munyedza 2011: 9). The UNCTAD observed that the indigenisation policy had a significant impact on FDI flow in and out of the country (UNCTAD, 2011). In order to lure FDI, investors need clarity regarding the provisions of the IEEA and what they seek to achieve with regards to issues such as: 1) the imposition of the indigenisation levy and its legitimacy; 2) whether or not the specified share transactions issues regarding the 51% equity threshold are negotiable or not; 3) the submission of indigenisation plans; and 4) the plausibility of payment against compliance with the law (Matyszak: 2016: 15-18). It is evident that western and Asian investors prefer regulatory flexibility in host countries to facilitate the ease of doing business and maximum profiteering. These investors have little regard about the best interests of the host countries and their best interests. As such, they employ lawfare as a tool of arm twisting the desperate African governments to head into a race to the bottom in order to attract investments which do not significantly benefit their countries. It is therefore not surprising that the manner of implementing the IEEA has been contested since its inception in 2007 (See *Southmark Trading (Pvt) Ltd v Karoi Properties (Pvt) Ltd* 2013 ZWHHC 52). Individuals who are sympathetic to the western economic agenda often cautioned the Zimbabwean government under Mr Robert Mugabe against implementing the IEEA at the expense of FDI. For example, the former governor of the Reserve Bank of Zimbabwe, Mr Gideon Gono warned government to guard against implementing the IEEA in a manner that would frustrate and threaten foreign investors (RBZ Monetary Policy Statement, 2009). The Canadian ambassador to Zimbabwe, Lisa Stadelbauer, also argued that Canadian investors are hesitant to invest in Zimbabwe because of the uncertainties informing the application of the IEEA in the country (News Day, 2014). A case in point with regards to a need to clarify the framework of the IEEA is that in December 2015, IEE General Notice 394A titled “Frameworks, Procedures and Guidelines for Implementing the IEEA” was gazetted by the government with the Finance Minister, Mr Chinamasa being credited for the legal instrument. Minister Chinamasa provided for a 5 year compliance period with the IEEA. The publishing of General Notice 394A immediately drew the attention of Minister Zhuwao whose ministry is responsible for indigenisation. Minister Zhuwao disagreed with Minister Chinamasa’s 5 year period and instead proposed a 1 year compliance period. The differences between the two ministers’ pronouncement supposedly presented a basis of confusion amongst investors. However, guidance on ascertaining an “investor friendly” implementation period was then to be obtained from the “10-point plan for economic growth” introduced by the former President of Zimbabwe, Mr Robert Mugabe, which advocated amongst other issues for a need to promote private sector investment (Gumbo 2015). To that end, the pro-western Minister

Chinamasa's longer compliance period was arguably regarded as being investor friendly, but at whose expense? Only the impoverished African indigenes who have been victims of the unrestrained western plunder of their natural resources continue to suffer from the extended period of plunder offered by Minister Chinamasa. The IMF head of mission, Domenico Fanizza, speaking at press briefing, pointed out that Zimbabwe needed to review its indigenisation laws to attract FDI and generate money to pay off its IMF debt (New Zimbabwe 2015). The western backed government led by Mr Emmerson Mnangagwa, who toppled Mr Robert Mugabe in a *coup de tat* in 2017, has since rushed to amend the IEEA to make it attractive to western and Asian investors at the expense of its African indigenes. Africans must remember that there is no independence without controlling the levers of a country's economic. Any perception that FDIs will drive sustainable development and/or economic growth is a fallacious utopian dream which is evidently misguided and a hallmark of naivety. Foreign investors have been on the African continent for decades yet African countries continue to sink deeper in economic crisis whilst the investors continue to siphon natural resources and repatriate the revenue generated to their home countries. It is no wonder the west and Asia are more developed than Africa. They use African resources to sustain economic growth and development in their countries. Africans are yet to wake up to this reality.

Another supposed problem with regards to the IEEA emanates from section 3(5). Section 3(5) provides as follows:

The line Minister may prescribe that a lesser share than fifty-one percent or a lesser interest than a controlling interest may be acquired by indigenous Zimbabweans in any business in terms of subsections [3](1)(b)(iii), (1)(c)(i), (1)(d) and (e) in order to achieve compliance with those provisions, but in so doing he or she shall prescribe the general maximum timeframe within which the fifty-one percent or the controlling interest shall be attained (See section 3(5) of the IEEA).

Zimbabwean policy makers through their pronouncements appear to suggest that the 51% equity share threshold can be negotiated (Matyszak, 2016: 16). However, the last part of section 3(5) of the IEEA points out that "...but in so doing he or she shall prescribe the general maximum timeframe within which the fifty-one percent or the controlling interest shall be attained." From the wording of section 3(5), there appears to be no room for a negotiation regarding the 51% equity threshold. Again, the mixed statements from policy makers are alleged to have the potential to scare away potential investors as investing under such circumstances could be tantamount to undertaking a high risk business venture. It must nevertheless be questioned as to why Africans must not have a controlling stake in their resources and economies when the

west and Asia control theirs? This is a pertinent issue which African policy makers and academics must address.

The challenges besetting the implementation of the IEEA were allegedly compounded by Minister Zhuwao's pronouncement of an indigenisation levy in pursuit of the objectives set out in section 17(1)-(6) of the IEEA. Matyszak argued that the objectives of the levies provided for in section 17 could be equated to the imposition of surcharge against all businesses whether indigenous or not, to facilitate indigenisation and empowerment programmes (Matyszak, 2016: 16). However, former Minister Zhuwao imposed a 10% levy on all foreign owned business on their annual income in the first year rising to 12.5% in the second year. According to former Minister Zhuwao, the levies were meant to raise internal resources for funding the indigenisation programmes and would be distributed through community share ownership schemes. Non-compliance with the levy was accompanied by possible closure of foreign firms which do not comply with the March 31, 2016 deadline. This was a plausible initiative aimed at realising economic transformation in Zimbabwe. Sadly, the western sympathetic Confederation of Zimbabwean Industries (CZI) queried Zhuwao's plausible initiative and sought dialogue with government regarding the imposition of the levy which threatened private sector investment. Again it has to be questioned if the same CZI has an appreciation of how the private sector has disenfranchised many ordinary Zimbabweans in pursuit of profiteering. The argument here is that it can no longer be business as usual in Africa. Africa needs radical and innovative thinkers who can steer the troubled African ship from the murky waters of certain disaster.

From Zimbabwe's experience, Namibia has to realise that implementing indigenisation laws is not an easy ride. Evidence to this claim is the fact that the country's economic outlook was immediately downgraded in the aftermath of the tabling of the NEEEF Bill before Namibia's parliament. Nevertheless, there is need to ensure that the NEEEF Act, if passed into law, should be clear as regards how it will be implemented. The compliance period for the economic empowerment programme must be clearly outlined. The proposed threshold of 25 percent is justified. However, security on the businesses of foreign investors must be given due consideration, where necessary. Failure to address these concerns is likely to lead to an economic collapse in Namibia similar to what is currently prevailing in Zimbabwe. Investors have pulled out in numbers with high unemployment now the order of things in Zimbabwe.

South Africa

Within a few years of introducing the Black Economic Empowerment (Herein after BEE) programme (See the Department of Trade and Industry black economic empowerment strategy document 2003. See also the Preamble

of the B-BBEE Act. The B-BBEE Act seeks to establish a legislative framework for the promotion of black economic empowerment), it became evident that in practice, the benefits were not reaching large numbers of those intended to be the beneficiaries of the programme (Ncube 2004). Rather, the pattern emerged of a few well connected business elites colluding with politically connected black elites to capture the opportunities spawned by the programme (Andrews Centre for International Development at Harvard University 2008: 96; Zuma 2013; Andreasson 2011: 647; Bogopane 2013: 277; Yokogawa South Africa 2010). A robust and systematic approach had to be adopted to address this untenable situation (BEE Commission 2001: 2; Osode 2010: 261; Kalula & M'Paradzi 2008: 108; Osode 2004: 108; Southall 2007: 83). The result was the passing of the B-BBEE Amendment Act (Broad-Based Black Economic Empowerment Amendment Act 46 of 2013 (hereafter the B-BBE Amendment Act)). This Act amended the Broad-Based Black Economic Empowerment Act (Herein after B-BBEE Act) (Broad-Based Black Economic Empowerment Act 53 of 2003) with the primary objective of addressing all known and perceived weaknesses in the current regulatory framework (*Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (2) BCLR 207(CC). See also *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) para 17-18; *Chairperson, Standing Tender Committee v JFE Sapela Electronics* 2008 (2) SA 638 (SCA) para 14; and *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA) para 9; *Esorfranki Pipelines v Mopani District Municipality* (40/13) [2014] ZASCA 21 (28 March 2014); *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd* (CCT 39/10) [2010] ZACC 26 paras 83 and 84; *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* 2008 (2) SA 638 (SCA) para 27; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others* 2008 (2) SA 481 (SCA) para 23; *Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 9 and *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another* 2010 (4) SA 359 (SCA) para 20).

Regulation of Fronting in South Africa

The South African B-BBEE Amendment Act adopted a plausible dualist approach to addressing the challenge of defining business fronting; the one approach focusing on providing a comprehensive yet elastic definition of fronting and the other aimed at establishing a strong and properly resourced institutional framework for implementation (Levenstein 2013). The first facet of the said definition is a broad, catch-all definition of what constitutes business fronting. In this regard section 1(e) of the B-BBEE Amendment Act defines

“fronting practice” as “a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act...” Clearly, the wording of this broad definition includes the three most common forms of business fronting, namely, window dressing (Section 1(e)(a) of the B-BBE Amendment Act defines window dressing as an act of introducing black people to an enterprise on the “basis of tokenism and maybe in the form of: 1) discouraging or inhibiting them from substantively participating in the core activities of an enterprise and discouraging or inhibiting them from substantively participating in the stated areas and/or levels of the participation”. See also Department of Trade and Industry “Fronting” 2013

www.thedti.gov.za/economic_empowerment/fronting/, benefit diversion (Section 1(e)(b)-(c) of the B-BBE Amendment Act defines benefit diversion as “initiatives implemented where economic benefits received as a result of the B-BBEE status of an enterprise do not flow to black people in the ratio as specified in relevant legal documents.” See also Honey Comb Transformation “Fronting a company’s ownership”

www.honeycombttransformation.co.za/fronting-companys-ownership/) and the use of opportunistic intermediaries (Section 1(e)(d) defines opportunistic intermediaries to include “... enterprises that have concluded agreements with other enterprises with a view to leveraging the opportunistic intermediary’s favourable B-BBEE status in circumstances where the agreement involves: 1) significant limitations or restrictions upon the identity of the opportunistic intermediary’s suppliers, service providers, clients or customers; 2) the maintenance of their business operations in a context reasonably considered improbable having regard to resources; 3) terms and conditions that are not negotiated at arms-length on a fair and reasonable basis”). Namibia appears to have followed the South African model to the letter.

The legislature through section 1(e) of the B-BBEE Amendment Act adopted a plausible definitional approach of a catch-all, open ended construction of business fronting (Section 1(e) of the B-BBEE Amendment Act defines fronting as any “transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of the B-BBEE Act, including but not limited to practices in connection with the B-BBEE initiative...” which is an approach that is usually characterised by an element of vagueness intended, in this particular case, to ensure coverage of conduct or activities which may amount to business fronting but which may have been unwittingly excluded by the legislature (*National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 48. It was pointed out in this case that the need for clarity in legislative instruments does not require absolute certainty. See also *Affordable Medicines Trust and Others v Minister of Health and Others*

[2005] ZACC 3; 2006 (3) SA 247 (CC); and 2005 (6) BCLR 529 (CC) (Affordable Medicines) at para 108). The second facet of the definition employs a closed-list of practices, conduct or situations falling within the regulatory scheme of business fronting (The challenges identified above as being likely to result from the element of vagueness inherent in a broad definition of “fronting” are certain to be mitigated by the second facet of the definition of “fronting” in the B-BBEE Amendment Act which explicitly identifies certain specific conducts as constituting fronting. This part of the definition section 1(e) declares ‘fronting practice’ as:

...including but not limited to practices” connected to a B-BBEE initiative

—
a) “in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise”; or

b) “in terms of which the economic benefits received as a result of the broad-based black economic empowerment status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation.

Additionally, section 1(e)(c) provides that fronting includes practices in connection with a B-BBEE initiative: “involving the conclusion of a legal relationship with a black person for the purpose of the enterprise achieving a certain level of B-BBEE compliance without granting the black person economic benefits.” Lastly, Section 1(e)(d) provides that fronting includes practices in connection with a B-BBEE initiative: “involving the conclusion of an argument with another enterprise in order to achieve or enhance B-BBEE status in circumstances in which i) there significant limitations on the identity of suppliers...ii) maintenance of business operations ...is reasonably considered improbable and iii) the terms and conditions were not negotiated...on a fair and reasonable basis.” See also *N.D.P. Namboodripad v Union of India* (2007) 4 SCC 502; *Hamdard (Wakf) Laboratories v Deputy Labour Commissioner* (2007) 5 SCC 281; *Bharat Cooperative Bank (Mumbai) Ltd. v Employees Union* (2007) 4 SCC 685; *Himalayan Tiles and Marble (P) Ltd. v Francis Victor Coutinho* (1980) 3 SCC 223; *Dilworth v Commissioner of Stamps (Lord Watson)* (1899) AC 99; and *Mahalakshmi Oil Mills v State of A.P.* 1989 AIR 335).

In addition to the dual faceted definition of fronting, the B-BBEE Amendment Act establishes a Broad-Based Black Economic Empowerment Commission (B-BBEE Commission) which is required to effectively assume the role of the regulatory watchdog over issues pertaining to the B-BBEE Act (Section 8 of the B-BBEE Amendment Act. Under this provision, section 13B is inserted into the B-BBEE Act to provide for the establishment and status of

the B-BBEE Commission). The B-BEE Commission which will be established as, "...a juristic person with the duty of providing oversight to the B-BEEE process has the responsibility to: 1) investigate cases of fronting; 2) investigate complaints; and 3) receive and monitor reports on B-BBEE from organs of state and listed entities" (Section 13B of the B-BBEE Amendment Act. See also section 13F of the B-BBEE Amendment Act and is titled "Functions of Commission"; and section 13J of the B-BBEE Amendment Act and is titled "Investigations by the Commission").

However, a leading commercial law commentator, Levenstein, has undertaken a study on BEE related fronting practices. In the study, Levenstein identified several fronting practices such as the following: 1) apparent ignorance fronting, 2) sector code fronting, 3) holding company fronting, 4) exempt micro enterprise fronting, 5) similar name fronting, 6) ownership fronting, 7) trust fronting, 8) management and employment equity fronting, 9) skills development fronting, 10) procurement fronting, and 11) enterprise development fronting (Levenstein 2013).

The most common fronting practices identified by Levenstein could also be outlined as follows:

- 1) Forged certificates bearing names of well-known verification agencies;
- 2) The use of unaccredited verification agencies;
- 3) Opting to use the BEE codes of good practice rather than the sector codes;
- 4) Using old or future financial year data to ensure that one's turnover comes in below the threshold for generic codes or qualified small enterprises codes;
- 5) Using employee trusts where the ultimate beneficiaries are not black people;
- 6) Putting employees into positions where they do not have similar responsibilities or receive similar rewards to white people in the same positions;
- 7) Misrepresenting training costs. For instance, counting SETA grants as training spend, or counting training done by labour brokers or creating a training expense such that the learner then either does not attend or has a fabricated invoice; and
- 8) Misrepresenting procurement spend by counting imports or by using invoices from a supplier BEE shell company to derive an inflated score or counting a third party's BEE status. A common example is where a company that spends money on its credit card applies the bank's BEE status, instead of looking at the BEE status of each individual supplier (Levenstein 2013).

Leventsein's study provides a broader coverage of specific fronting practices which offers the public greater guidance regarding the potential scope of "fronting" in comparison to sections 1(e) (a)-(d) of the Amendment Act. Given that Levenstein's study provides a significantly longer and more enlightening list of forms of "fronting", it is submitted that there is room to enlarge the number of specific types of fronting outlined in the said sections of the in the NEEEF Bill. Whilst not constituting a closed list of what fronting may be the list provided in section 1(j) is inadequate when one considers the threat posed by "fronting" to the genuine challenge of increasing the participation of the previously disadvantaged indigenous majority in the economic mainstream of Namibia (Ibid. Levenstein identifies a list of fronting practices which are as follows: 1) exempt micro enterprise fronting, 2) similar name fronting, 3) apparent ignorance fronting, 4) holding company fronting 5) sector code fronting, 6) ownership fronting, 7) trust fronting, 8) management and employment equity fronting, 9) skills development fronting, 10) procurement fronting, and 11) enterprise development fronting amongst others). Legislation must be drafted in such a way that the readers know what the law expects from them (See *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 100; *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) (*South African Liquor Traders*) at para 27; *Union Government v Mack* 1917 AD 419; *Volschenk v Volschenk* 1946 TPD 486; *Association of Amusement and Novelty Machine Operations v Minister of Justice* 1980 (2) SA 636 (A) and *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A)). In that regard sufficiency and precision are essential qualitative criteria for a legal regulatory instrument (*Mail & Guardian and Others v Chipu N.O. and Others* 2013 ZACC 32 Case CCT 136/12 paras 64-65). Accordingly, the specific fronting types provision in the definition section can be strengthened by including more specific forms of fronting similar to those identified by Levenstein in order to maximise guidance on the nature and scope of fronting in South Africa. This is an area of weakness which law makers ought to consider in the next round of law reform relating to the NEEEF legislative and policy framework.

The South African Protection of Investment Act (PIA) 22 of 2015

Owing to the evident decline in FDI inflows in South Africa, attributed to the supposed foreign investor insecurity largely caused by radical economic empowerment policies (a tool often used by capitalist institutions to arm twist African governments into adopting regulatory flexibility and resultantly a race to the bottom), the Department of Trade and Industry (DTI), in July 2015,

unveiled a new PPI Bill. The amended 2015 PPI Bill (See the 2015 PPI Bill published in the Government Gazette No. 39009 of 22 July 2015) maintained the position adopted in the 2013 PPI Bill of domesticating international investment protection. This position was criticised by South Africa's foreign and local business communities who argued that the contemporary global trends aim at the internationalisation of protecting investments (Leon 2015). The 2015 PPI Bill, like the 2013 Bill, plausibly gave foreign investors significantly less protection than most Bilateral Investment Treaties which supposedly provide, prompt, adequate and effective compensation and international arbitration to settle disputes. In terms of the 2015 PPI Bill, foreign investors would have to refer any dispute they may have with the South African government to the country's own courts (See section 12(4) and (5) of the 2015 PPI Bill). This approach has been retained in section 13(4) of the PIA.

Section 13(4) of the PIA provides that: "Subject to applicable legislation, an investor, upon becoming aware of a dispute as referred to in subsection (1), is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment." The approach to rely on local courts as opposed to foreign courts is commendable in that such courts have a better appreciation of the local context as informed by historical developments. As such, it would be practical to rely on the South African courts to address investment disputes as they are in a position to redress historical, social and economic inequalities and injustices attributed to western driven colonial and post-colonial political and business activities. Further, the South Africa courts are better placed to 1) uphold values and principles espoused in section 95 of the South African Constitution of 1996; 2) uphold rights guaranteed in the Constitution; 3) promoting and preserving cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage; 4) fostering economic development, industrialisation and beneficiation; 5) achieving the progressive realisation of socio-economic rights; and 6) protecting the environment and the conservation and sustainable use of natural resources (See section 12 of PIA).

Section 13(5) was then added in an ill-conceived manner to appease the foreign investors who preferred foreign arbitration systems as opposed to local systems. Section 13(5) provides that: "The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. The consideration of a request for international arbitration will be subject to the administrative processes set out in section 6. Such arbitration will be conducted between the Republic and the home state of the applicable investor." This approach appears to be an attempt by the South African government to seek to appease investors' confidence at the expense of growing infant industries and enlarging the space for the

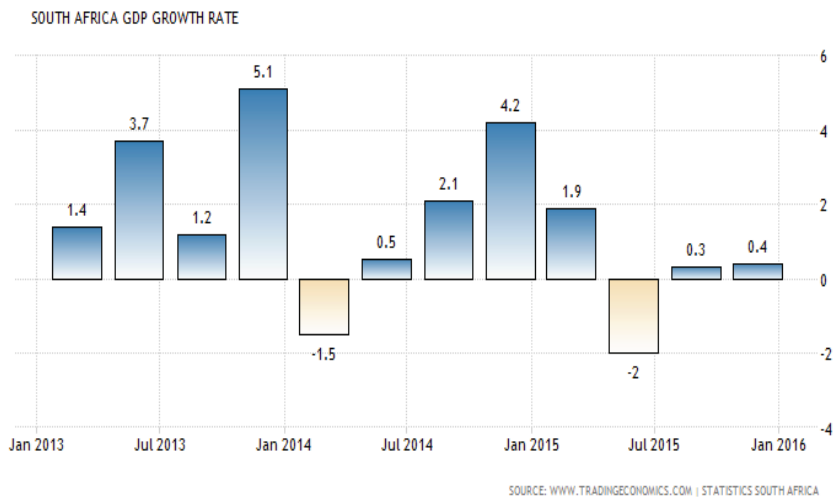
participation of previously and still disadvantaged indigenous South Africans from participating in the economic mainstream. South Africa does not want to follow this self-destructive route.

An example of the dangers of promoting western oriented investment policies and laws is that the country will be subjected to the economic whims and caprices of capitalist investors. If such investors are not comfortable with radical economic transformation policies and the BEE driven legislation they will unilaterally withdraw their so-called FDI at the expense of the South African masses (Porter, 2015). These investors employ the narrative of the “volatile” global economic patterns as a basis for withdrawing their investments in response to radical economic policies, hence external investment flows exceeded internal investment flows by a significant amount estimated at R13 billion in 2014 (Ibid). They thus argued that the decline in FDI in South Africa was informed by negative and aggressive indigenisation policies which have threatened investor security. The negative FDI trends continued into 2015, with first quarter figures of the year showing that, “inward directed FDI declined by R22 billion due to foreign investors withdrawing capital injection from South African markets” (Ibid). What is hardly mentioned, in these developments, is the role that neoliberal international economic rating agencies play in projecting or pronouncing “negative economic performance ratings” to African economies in order to force their governments to align their economic policies to suit the western agenda. It therefore is not surprising that South Africa’s credit rating was downgraded by Moody’s to a level just one rank above the “junk economy” status. The 2015 AT Kearney Foreign Direct Investment Confidence Index which lists the world’s 25 most business friendly destinations also saw South Africa dropping out of the group of the world’s 25 most attractive investment destinations (See the 2015 AT Kearney Foreign Direct Investment Confidence Index available at www.atkearney.com. The AT Kearney Foreign Direct Investment Confidence Index was introduced in 1998 to identify the world’s 25 leading investment friendly countries in the world. South Africa has constantly featured in the top 25 but has dropped out of the current list of investment friendly countries in the world.). These developments must be viewed from the perspective that in 2012, when South Africa was fairly compliant to the neoliberal inclined free market policies and had a positive ease of doing business index, it was ranked 11th, fell to 15th in 2013 and rose to 13th in 2014 (Jeffery, 2015). In principle, the more a country is amenable to being exploited by western imperialist forces the higher it is rated as an investment friendly environment.

The drop in ratings was thus attributed to the supposed lack of regulatory clarity and a general dearth of political will and commitment to engage in economic reform and a more entrepreneurial attitude in the face of the largely

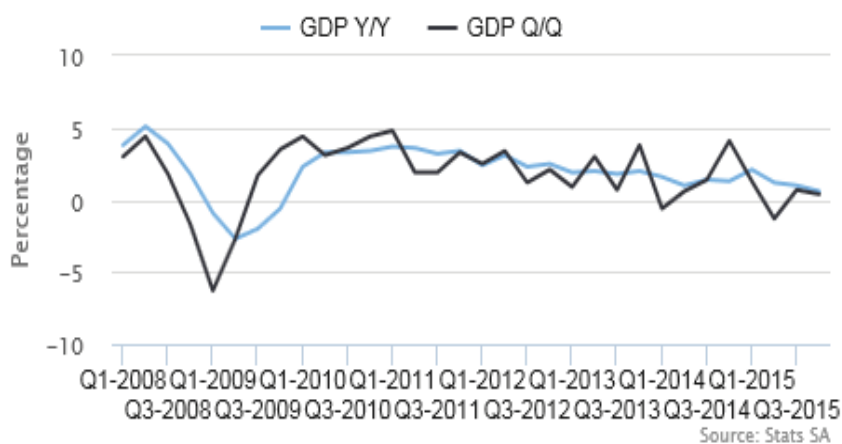
“populist indigenisation policies” which allegedly negatively affect western business operations. Where it would have been plausible to adopt investor friendly policies in response to the decline in FDI and an unstable global economic environment, the South African government plausibly elected to come up with a much maligned yet pro-indigenous PPI Bill (The Promotion and Protection of Investment Bill, 2013 was published for comment on 1 November 2013) and resultantly the PIA aimed at protecting “investors” (Ibid). There is consensus around the fact that the PIA has overhauled the neoliberal inclined investment regime, to accommodate aggressive indigenisation policies. This development tied together with proposals for land reform without compensation have led to a growing discomfort amongst foreign investors with the fact that the standard of investment protection under the PIA is of lower quality than that afforded by the BITs and international practice (Marais, 2014). This argument is informed by the general understanding that the neoliberal law and economics school of thought applies micro-economics as well as the simple models of welfare-economics as instruments to study the creation, construction, procedures, and financial effect of regulations and legal establishments (Mercurio, 2009: 62). Hypothetically, the law and economics school of thought places efficiency together with or in the place of concepts of justice and/or fairness in order to ensure that the policies and laws adopted are sustainable and/or economically viable (Deakin and Wilkinson 2006: 30).

Figure 1: South Africa GDP Growth Rate, January 2013-2016



Source: [www.TRADEECONOMICS.COM/Statistics South Africa](http://www.TRADEECONOMICS.COM/Statistics%20South%20Africa)

Figure 2: South Africa’s Quarterly GDP, 2008-2015



Source: Statistics South Africa

The PIA makes provision for international arbitration (Section 13(5) of the PIA). Such arbitration will only be permissible on a state-to-state basis and excludes investor participation. Further, such international arbitration will only be available subject to the government’s consent and only if domestic remedies have been exhausted. This process is commendable and gives room for the government to implement indigenisation policies.

Regarding compensation, instead of “prompt, adequate and effective compensation” on the basis of a formula that gives swift payment of market value at the minimum, foreign investors will find their rights on expropriation governed by the 2015 Expropriation Bill (See the 2015 Expropriation Bill published in Government Gazette No. 38418 of January 2015) which at the time of writing had been tabled before parliament. The pro-indigenous Expropriation Bill, if adopted, will prevent South Africa’s courts from ruling on the validity of any expropriation (See sections 22 and 23 of the 2015 expropriation Bill). In what clearly appears to be restorative approach to addressing colonial injustices, investors will be given only sixty (60) days to sue on compensation payable (See sections 15 and 16 of the 2015 Expropriation Bill). Failure which, investors will be deemed to have accepted government’s offer for expropriation a development which should give African indigenes plenty of reasons to be excited about the restoration of their wealth. Predictably and unjustifiably so, the investors will contend that they have plenty reasons to worry as there will be no security for their investments which have thus far impoverished African indigenes.

The PIA further provides that foreign investors will be treated equally like local investors, only in “like circumstances” (Section 8(1) of the PIA). This has

prompted some foreign investors to express concerns that they might be penalised if they have done less than local companies on black economic empowerment requirements. For example, the PIA includes a list of factors that may be used to establish “like circumstances” such as 1) the effect of the foreign investment on South Africa 2) the effect of the FDI on employment and 3) factors relating to the foreign investment (See section 8(2) of the PIA). These provisions are plausible as they promote indigenisation laws and BEE codes. Strangely, the provisions have been branded as containing vague wording which does not offer much guidance to the person interpreting the law as to the exact content of the provisions.

Equal treatment of foreign investors, according to the PIA indicates that the level of security provided to them will depend on “available resources and capacity” (Section 9 of the PIA). Proponents of the western foreign investments ideology contend that foreign investors will face significant challenges in that the PIA and proposed legislation such as the Expropriation Bill undermine property rights, by limiting business autonomy through BEE rules on ownership, managerial appointments and preferential appointment and seeks to incrementally bring about regulatory or “indirect” expropriation of businesses for which the Expropriation Bill will provide no compensation. A counter question though is, did colonisation not undermine indigenous Africans’ property rights? Indirect expropriation arises where the state itself does not acquire ownership but regulation nevertheless deprives owners of many of the usual powers and benefits of ownership. For example, the Private Security Industry Regulation Amendment Bill of 2012 (See the Private Security Industry Regulation Amendment Bill published in Government gazette No. 35461 of 22 June 2012) which is still to be signed into law requires foreign security companies to transfer 51% of their equity to South Africans (See S 9(c) of the 2012 Private Security Industry Regulation Amendment Bill). This piece of legislation resembles Zimbabwe’s Indigenisation legislation which provides for a similar approach (See the Zimbabwean Indigenisation and Economic Empowerment (General) Regulations gazetted on the 29th of January 2010 and subsequently came into effect on the 1st of March 2010. See also section 11 of Statutory Instrument 21, Indigenisation and Economic Empowerment (General) Regulations 2010 [CAP 14:33]. See further S2(a) of General Notice 114, Indigenisation and Economic Empowerment (General) Regulations of 2011; the Zimbabwean Indigenisation and Economic Empowerment Act [Chapter 14:33] of 2007; S20(1)(c) of the Zimbabwean Constitution Act 20 of 2013; Ngwerume and Massimo 2014: 4; Gagare 2014; Maswanganyi and Karombo 2013; Mathuthu 2014; Parliamentary Thematic Committee Report 2014; Matunhu 2012: 5; Zimbabwe Environmental Law Association 2015; Mabhena and Moyo 2014: 72; and Zikhali Ncube and Tshuma 2014: 27).

Recommendations for Namibia

The NEEEF Bill is a plausible mechanism for advancing the interests of previously disadvantaged persons as it advocates for the participation in the economic mainstream. However the following must be considered:

i. The NEEEF Bill in its current state is plausible yet it is a potential threat to the western and Asian driven FDI. Evidence has been obtained from the experiences of Zimbabwe and South Africa that indigenisation policies have led to western investors withdrawing their investments and taking them away to countries which promote the capitalist and World Bank driven ease of doing business approach. To that end, Namibia has to be prepared for the backlash from the west should they introduce the NEEEF law. The 25% equity threshold is plausible though it appears to be excessive for western and Asian driven businesses. Those who query that the 25% equity threshold is excessive contend that investors are already paying taxes and are involved in corporate social responsibility. As such, it may be burdening companies who are already operating in a volatile global economic environment to cede the 25% shareholding to locals. In that regard they further contend that considering that the Namibian Government benefits from the taxes paid by the investors, it would not be prudent to cut the revenue source by imposing rigid regulatory regimes that scare away or threaten investors. They use the examples of South Africa and Zimbabwe who have experienced capital flight. For business purposes, Namibia may need to be cautious in this regard. Perhaps reducing the 25% equity threshold to around 10% - 15% may be plausible. The figure can then be reviewed after a 10 year implementation cycle depending on whether the initial phase has been successful. However, indigenisation must take place in Namibia.

ii. The definition of fronting as adopted from the South Africa definition of the same may not be adequate. The law must be clearer to those that read it. Levenstein has provided more specific forms of fronting which could benefit interpreters of the NEEEF Bill, should it be passed into law. There is therefore need for legislators to consider broadening the definition of fronting before the NEEEF Bill is passed into law.

iii. Other options such as employee share ownership schemes should also be considered as should human capital investment through education. Should this happen, there would no need of imposing ownership control of already existing businesses. Rather government will place emphasis on equipping previously disadvantaged persons with the necessary business skills to start their own local investments which can ably compete with the already existing foreign investors.

iv. It is also proposed that a specialised commercial court which deals with fronting practices be instituted. Ordinary courts may not be in a position to deal with the specialised nature of economic empowerment related matters such as fronting and the quantum of financial violations that may be involved. For a serious matter such as economic empowerment, cases emanating thereof must not be delayed by the already overwhelmed judiciary system with an already existing backlog. A specialised court such as an economic empowerment tribunal and/or court could expedite the adjudication of matters falling under its jurisdiction.

v. There is need to ensure clarity of the NEEEF Act. There is need to provide room for sector specific compliance with the NEEEF Act. For example the mining, tourism, agriculture and banking sectors should not have the same threshold of compliance. There should be no one-size-fits- all approach to implementing the NEEEF Act, should it become law. The timeframe for compliance with the equity threshold should be spelt out.

Conclusion

The NEEEF Bill is a plausible initiative in attempts aimed at addressing the existent inequalities currently informing the post-colonial Namibia. Previously disadvantaged and still disadvantaged persons must be afforded an enlarged room to participate in the economic main stream of the country. This chapter has established that adopting an inclusive regulatory approach to economic growth is an ideal mechanism to pursuing the economic empowerment of previously disadvantaged persons even though the reprisals from the west may be harsh. Sanctions and “investment” withdrawals were experienced in Zimbabwe. In South Africa, there has been a steady decline of “investors” in response to the implementation of indigenisation policies and laws. Whilst its net impact on “investment” security is exceedingly negative, indigenisation remains important to Namibia and the rest of Africa. The experiences of South Africa and Zimbabwe in which there has been a detailed capital flight have been highlighted. Zimbabwe has suffered a serious decline in FDI as has South Africa which has already fallen out of the top 25 “investor” friendly countries according to the AT Kearney ratings. At the centre of the economic regression in Zimbabwe and South Africa has been the withdrawal of capital “investments” owing to the supposed threats imposed on investments by the aggressive indigenisation policies and laws which have been pursued by the aforementioned countries. On the whole, regardless of the experiences of South Africa and Zimbabwe, the NEEEF Bill remains a necessity for a country whose Gini co-efficient is very high. African countries must decolonise and control

their own economies in order to realise tangible economic growth, sustainable development and human capital “investment”.

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International Trade Agreements and the Trade-Labour Linkage Debate: A Southern African Perspective – Part 2

Tapwa V. Warikandwa

Introduction

World trade is regulated by legally binding and enforceable international trade agreements on multilateral, regional and bilateral levels. These agreements go beyond mere trade regulations and have repercussions for “non-trade” issues such as employment or human rights (Warikandwa & Osode (LDD) 2014; Warikandwa & Osode 2017). The repercussions for employment and human rights have prompted debates over a need to establish a trade-labour linkage in the multilateral trade regulatory system of the World Trade Organisation (WTO) (Warikandwa & Osode (CILSA) 2014). Such debates are crucial for a region like Southern Africa, which is easily one of the poorest regions due to the prevalence of high levels of poverty and/or impoverishment. In this chapter, a critical analysis of contemporary events taking place in Southern Africa in relation to the trade-labour standards linkage will show that a more radical and sustainable legal strategy needs to be adopted in order to improve the protection of core labour standards in trade. The conditions prevailing within Southern African Development Community (SADC) could also be a true reflection of challenges being faced by developing countries in Africa and other parts of the world. Therefore, lessons drawn from the region’s experiences might be of immense practical value on a continental and global scale. In principle, there is need for African countries to unyoke themselves from dominant western business practices and pursue humane business practices which ensure that workers also benefit from the proceeds of their labour. The chapter will begin with a discussion of the trade-labour linkage debate in the context of the Democratic Republic of Congo (DRC).

Democratic Republic of Congo (DRC)

Although the DRC is one of the richest African countries in terms of mineral resources it is struggling to develop. The 2012 Doing Business Report indicated that the DRC ranked 178th out of 183 economies in the world and classified it as a low-income country (World Bank 2012). The DRC’s ranking records a 2 point decrease from 2011. The decrease is regarded as being

reflective of the top three obstacles of running business in the DRC which include access to finance, electricity and practices of the informal sector. The doing business report makes no mention of the relationship between the low compliance with labour standards and the ease of doing business in the DRC. This could imply that prevailing low labour standards are a key factor to ease of doing business in the DRC in terms of the proposals of the Bretton Woods Institution which recommend flexible labour standards as a key component to the ease of doing business). The DRC has a high incidence of violations of core labour standards. The United Nations Children's Fund (UNICEF) revealed that 29 per cent of boys and 34 per cent of girls aged between 5 and 14 perform child labour in the DRC (UNICEF 2012). As far back as the year 2000, the ILO estimated that nearly 2 million children aged between 10 and 14 were economically active in the DRC, with an almost equal number of girls and boys (International Labour Organisation, 2000-2004). Currently, children working in mines and quarries comprise on average about one third of the DRC workforce (International Trade Union Confederation, 2010; Youant, 2010; United States Department of State, 2009). According to reports by NGOs and news agencies, the problem is prevalent in mining regions such as Katanga, Kasai and Kivu which are rich in cobalt, uranium, gold, diamonds, copper and other ores (Guerin 2006; Human Rights Watch 2010; Freedom House 2010). Such mines are a competitive advantage for the DRC in mineral resources and hence are a key component of the country's international trade (Cook, 2012). Children reportedly work in order to contribute to their family's income or to cover the education costs of other members of their family (UNICEF 2009; ITUC 2010: 1). In 2009, the ILO invited the DRC government, trade unions and employers to discuss the issue of child miners in Katanga and to design appropriate policies and programmes to withdraw children from the mines (ILO 2008-2010; Peopledaily 2010).

In November 2010, the International Trade Union Confederation (ITUC) released a report on the state of core labour standards in the DRC (ITUC 2008-2010). The release was timed to coincide with the review of the trade policies of the DRC by the General Council of the WTO at the end of November 2010. The report found prevalent violations of all core international labour standards especially with regard to child and forced labour. The report revealed that the DRC has ratified all eight core ILO labour Conventions (ITUC 2010). However, it noted that in view of restrictions on the trade union rights of workers, discrimination, child labour, and forced labour, resolute measures were needed to comply with the commitments the DRC accepted at Geneva and Doha in the WTO Ministerial Declarations during the period 1998-2001, and in the ILO's Declaration on Fundamental Principles and Rights at Work and its 2008 Social Justice Declaration (Ibid). The DRC Constitution recognises the rights to form

and join a union, collectively bargain and the right to strike (Articles 38 and 39 of the 2006 DRC Constitution). However, many trade unions are organised by employers and there are many cases of unionists being arrested, prosecuted and punished illegally (ITUC 2009; ITUC, 2010:1). In practice, the private sector is dominated by bogus unions with inactive members that have been created by employers in order to impede real trade unionism (ITUC 2010: 3).

Employees are entitled to join only one union which is established by the employers with independent trade unions being constant victims of harassment (Ibid). An example is that of the management of Société industrielle et forestière du Congo (Siforco), a wood production company belonging to the German group Danzer, which ordered the suspension of the union president and the dismissal of the trade union representatives at its facility (Ibid). Like most African countries' governments, it is difficult to stop or curb violations of labour standards practised by foreign companies as the governments tend to protect them (Ibid). The DRC government favours some foreign investors, like the China Railway Engineering Corporation (CREC) (China Railway Engineering Corporation (CREC) which operates through its main subsidiary China Railway Group is a construction and engineering services holding company offering surveying, design, construction, installation, manufacturing, research and development, and technical consulting services. The firm also is involved in property development and mining. Its more than 30 subsidiaries build and work on state projects including a large number of railways and miles of highways, industrial buildings, tunnels, and bridges. The company also offers its services internationally in North America, Europe, Africa, and the Asia Pacific. CREC is state-owned), that impede labour inspections, and discourages local authorities from enforcing trade union and other labour rights (ITUC 2010: 3). Working conditions and safety regulations are often not respected in such companies, whose management rely on the government's favouritism in order to lower wages or abuse other labour rights (Ibid). Furthermore, the authorities suppress attempts to report such abuses (Ibid. For example, the report makes reference to an incident which occurred on 2010 in which a member of an African Human Rights NGO was given a one year suspended sentence for reporting abuses of power and negligence by the local authorities in the uranium mines).

It is clear though that aside from the violations of labour standards where foreign companies are involved, the DRC, like many African countries, just has a poor record of compliance with labour standards. It is thus not surprising that they would not support the calls to include a social clause in trade agreements. There have been numerous allegations of lack of independence and efficiency of the courts of justice in the DRC where general labour matters are involved, without specific reference to trade. In September 2009, the Congo Labour

Centre (CCT) had to lodge a complaint with the ILO because, following a serious case of interference by the Director of Congo Customs dating back to 2005, the court did not call the Director to answer the charges (Ibid). It has also been reported that the police and the security authorities arrest persons arbitrarily (Ibid). On 19 January 2009, the president of the CCT, Nginamau Malaba, and two other trade union leaders were arrested by agents of the National Intelligence Agency after signing a memorandum denouncing the misappropriation of public funds by the Ministry of the National Economy and Trade (Ibid). The three unionists were held captive for a month and tortured (Ibid). They were released on 23 March 2009 after each paying USD 150 bail but the magistrate refused to examine the unionists' complaint of torture (Ibid).

In another case, in March 2009, Mulumba Kapepula, an employee of the National Railway Company of Congo (SNCC) was arrested by agents of the National Intelligence Agency for "insulting members of the government" because he had addressed a demonstration of the SNCC workers protesting because their wages were in arrears for 36 months (Ibid). Mulumba Kapepula was savagely tortured and then charged with offences against the Head of State but acquitted on June 5 2009, for lack of evidence (Ibid). In other cases police used excessive force to disperse demonstrations (Ibid). In March 2008 in Katanga, the police fired into a crowd and killed a boy during miners' strike and demonstration (Ibid). Freedom of assembly is not always respected (Ibid). It is thus not surprising that the DRC does not support the inclusion of a social clause in trade. However, it is important to question whether this is the most plausible approach for a country that is struggling to achieve a level of development commensurate with its vast mineral resources.

It is advisable that the DRC government stops harassing independent trade unions and protect them from employers' harassment in order to improve the protection of the right to organise. Law enforcers should also address anti-union discrimination cases and facilitate the complaints procedures. The DRC government should also fight corruption especially among judges, public servants, law enforcers and prison officers, so as to achieve effective law enforcement. The police and the security authorities must be subject to the rule of law and must not be allowed to arrest persons arbitrarily or commit any other unlawful act. The National Intelligence Agency should not be used against strikers or citizens' assemblies. Freedom of assembly should be effectively guaranteed in the DRC. The police should not interrupt peaceful gatherings or arrest participants of assemblies. In this way, workers will be able to air their grievances without the fear of victimisation by government officials and employers.

Malawi

The 2013 Doing Business Report on Malawi ranks Malawi as 133 out of 183 economies in the world with reference to labour standards being made in respect to the redundancy cost regarding advance notice requirements, severance payments and penalties due to a redundant worker whose services are terminated (World Bank 2013: 101). The Doing Business Report reveals that Malawi has regulated for the procedures to be adopted when dismissing a worker. It is not easy to dismiss a worker in Malawi without following the procedures set down at law. However, protecting workers is deemed as making it difficult to conduct business in a country. This position must be analysed in view of the challenges being faced in Malawi concerning the need to protect labour violations, especially of children in the country's agriculture sector). Malawi, like the DRC, has its fair share of problems concerning a trade-labour linkage. In June 2010, the ITUC, as it did with the DRC, released a report on the state of core labour standards in Malawi (ITUC (Malawi), 2010). The release was also timed to coincide with the review of the trade policies of Malawi by the General Council of the WTO in June 2010. The report indicated that Malawi ratified ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise in 1999, and Convention No. 98 on the Right to Organise and Collective Bargaining in 1965 (ITUC (Malawi) 2010: 1). Malawi's Constitution allows workers to form and join trade unions, except those serving in the police and army (Section 31(2) of the 1994 Malawi Constitution). Unions must register with the Registrar of Trade Unions and Employers' Organisations in the Ministry of Labour, without previous authorisation or excessive requirements (Part III of the Malawi Labour Relations Act (MLRA) 16 of 1996). The Registrar may suspend and cancel the registration of a union if it does not annually submit audited financial statements, a list of the names and postal addresses of its officers, and its number of members (section 21 of the MLRA).

The law stipulates that union activities should be conducted without government interference (section 12 of the Malawi Employment Act (MEA) 6 2000). Labour laws apply in the country's sole export processing zone (EPZ) where 20 companies operate (ITUC (Malawi) 2010: 3). Nonetheless, many companies in the EPZ resist union activity and deny access to the zone to trade unionists (Ibid). The law also establishes a formal process for the settlement of labour disputes with the mediation of the Labour Ministry (Section 64 of the MEA). The law provides for workers' right to strike if an agreement is not reached through the dispute settlement procedure (Section 46 of the MLRA). The union has to give the employer and the Ministry of Labour seven days' notice after the lapse of the 21 days' notice to the Ministry's conciliators that the dispute is unresolved (Section 46(3) the MLRA). However, the procedure is long

and unclear as in 2006, 12 branch officials of the Communication Workers Union, Telekom Networks Branch were dismissed on allegations that their agitation caused their colleagues to go on strike (ITUC (Malawi) 2010: 3)).

Similarly, in August 2008, 297 members of the Tobacco Tenants and Allied Workers Union of Malawi (TOTAWUM) were sacked by the Limbe Leaf Tobacco Company, a company within the Philip Morris group supply chain (The Telegraph, 2010), for allegedly failing to respect the normal dispute settlement procedure, thus rendering their strike illegal (ITUC (Malawi), 2010: 3). The workers had demanded a wage increase and proper equipment to protect themselves against toxic substances (Ibid).

Malawi's biggest challenge concerning trade and labour is the use of child labour (United Nations Committee on the Rights of the Child, 2009; United States Department of Labour, 2008). While it is acknowledged that child labour is on the decline in Asia and Latin America, the African situation appears to be different (ILO 2010; The new report shows that "Asia-Pacific and Latin America and the Caribbean continue to reduce child labour, while sub-Saharan Africa has witnessed an increase. Africa also has the highest incidence of children working, with one in four children engaged in child labour." Wolf 2010). The variation may be accounted for by the causes of child labour. In many African cultural settings for instance, boys are expected to work hard especially helping their fathers within the household (Mazonde 2001). They are also expected to assist elderly people carry their load (Ibid: 3). In this sense, the role of a child in a family or society, which is regarded as permeating social networks, is thus held as an important factor in promoting the use of child labour (Mazonde 2001: 3). The scale of the problem in Africa is among the key remaining challenges in tackling child labour, according to Constance Thomas, Director of the ILO's International Programme on the Elimination of Child Labour (IPEC). Other challenges include a much-needed breakthrough in agriculture, where most child labourers work, and the need to address often hidden forms of child labour (Ibid). It is an acknowledged fact that most child labour is rooted in poverty. The way to tackle the problem is therefore clear. Thomas rightly points out:

We must ensure that all children have the chance of going to school, we need social protection systems that support vulnerable families-particularly at times of crisis-and we need to ensure that adults have a chance of decent work. These measures, combined with effective enforcement of laws that protect children, provide the way forward (ILO Global Report 2010: 36).

The 2010 ILO Global Report on Child Labour also noted that:

A number of initiatives invoke the linkage between trade policy and child labour, including incentive schemes in both the United States and European Union Generalized Systems of Preferences (GSP). The issue has recently regained further ground in discussions about child (and forced) labour as certain Member States have introduced trade-related mechanisms to induce others to take action regarding the use of child labour in the production of certain internationally traded goods (ILO Global Report 2010: 74).

It is issues such as the role of child labour in the African community that seem to also contribute to African governments' resistance to the inclusion of a social clause in trade. Put in another way, the child labour issue highlights the significance of the problem of universal application of human rights in concrete cultural and social settings such as the African context. It is submitted that this issue cannot be simply ignored as much as the use of child labour cannot also go unchecked. A balance must be sought between human rights implementation, economic interests and cultural as well as social interests. As Fiszbein *et al* observed: "Work may be physically or mentally harmful, may interfere with schooling, and can undermine educational attainment and future earnings" (Fiszbein *et al* 2012: 502). The Global March against Child Labour stated that:

While the definition of child labour usually only involves labelling the types of work and children involved in a workplace, child labour has to be understood not only as a problem faced by individual children, but also as a system engraved in society perpetuating poverty, social evil, inequity, and unfair economic and social norms. Often poverty is believed to be the major cause of child labour but the fact that child labour causes and perpetuates poverty is little known. Children are not the cause of child labour but are victims of inadequate public and economic policy and ill-managed social systems that suppress the most vulnerable in society (The Global March against Child Labour 2012).

Malawi is considered to have one of the highest incidences of child labour in the world (Bhalotra 2003). Kasunda points out that Malawi has had an estimated 1.4 million child labourers, over the past years (Kasunda 2012). In his article, Kasunda makes reference to the findings of The Child Rights Information and Documentation Centre a non-governmental organisation in Malawi which conducted a research that resulted in the ascertaining of the number of child labourers in the country). The number has since risen to 2.1

million as indicated in a survey conducted in a National Child Labour Survey conducted by the Government of Malawi (Chauwa 2018). In 1999, Malawi ratified the ILO Minimum Age Convention (Articles 6 and 7.1 of the ILO Convention No 138 1973. According to the Convention, child labour refers to any work that interferes with the completion of a child's education, or is mentally, physically, socially or morally dangerous and harmful to children by its nature or circumstances of the work) and the ILO Convention on the Worst Forms of Child Labour (Article 3 ILO Convention 182 1999). In Malawi, the law allows children older than 14 years of age to perform work in any public or private agricultural, industrial or non-industrial undertaking or any branch thereof (section 23 of the Constitution of Malawi which sets the minimum age for employment at 14 years. See also section 21 of the MEA). The scope of the law does not extend to cases of work done in homes, vocational technical schools or other training institutions (section 21(2) of the MEA). However, the law does prohibit hazardous work for children younger than 18 years of age (section 22 of the MEA). On the other hand the Constitution sets the age limit at 16 years for acceptance into hazardous work creating a legislative collision which is currently being addressed by the Tripartite Labour Advisory Council (section 23(4) of the Constitution of Malawi; Chirwa, 2011: 193). Furthermore, the list of hazardous jobs is developed by the Labour Minister with the participation of employers' organisations and trade unions (section 22(2) of the MEA). Every employer is required to keep a register of child employees (section 23 of the MEA). The law prescribes 20,000 Kwacha (about 134 USD) and imprisonment for five years as penalties for offenders (section 24 of the MEA). Whether or not the amount of 134 USD is deterrent enough raises a lot of questions. The legislation provides for light work for children younger than 14 years of age without mentioning the lowest age limit allowed by the relevant ILO Convention, which is 12 years of age (ITUC, (Malawi), 2010: 3). This has seen renewed calls for the passing into law of the Tobacco Tenancy Labour Bill which could address the incidence of child labour in Malawi (The Tobacco Tenancy Bill was first drafted in 1995 but has not yet been passed into law, despite thousands of deprived children being caught up in the tobacco fields instead of classrooms. When enacted, the Tobacco Tenancy Bill will, among other things, set a new minimum age limit of employment at 18 years, and institute punitive measures of imprisonment and a hefty fine of up to One Million Kwacha for estate owners using child workers).

Even though child labour is found in virtually all sectors of the Malawian economy, formal and informal, including 16 commercial farms, smallholdings, domestic work and micro-industries, Malawi's effort to deal with it is directed towards the formal sector especially commercial agriculture (Plan Malawi 2009). Commercial agriculture is important for the country's economy. Tobacco alone

accounts for almost 70 percent of the country's foreign exchange earnings (Ibid; Otanez *et al* 2006: 224). Tea is an equally important crop for Malawi's economy as it is considered the second major foreign exchange earner (Edlring 2003: 6). While accurate data on the magnitude of child labour is lacking, there are clear indications that child labour in Malawi is widespread and on the rise (The ILO has classified child labour on tobacco estates as one of the "worst forms of child labour").

To appreciate the significance of the problem of child labour and the seriousness with which it has been addressed in Malawi, it is important to consider the kinds of activities which children on tea and tobacco estates perform. On tobacco estates, children perform a number of activities. As far back as the year 2000, Eldring *et al* (2000: 41) observed that children as young as nine were involved in what were called "light tasks" such as:

...clearing fields, making nursery beds and watering nurseries during the first phase of tobacco production; uprooting, transporting and transplanting seedlings and weeding during the second phase; picking, transporting, tying/sowing the leaf, picking down the dried tobacco and bundling during the last phase.

In 2009, Plan Malawi reported almost similar activities done by children on tobacco estates (Plan Malawi 2009: 10). Children do almost every job that adults do (Ibid: 1). Their activities chiefly involve clearing the fields in preparation for planting, working in the nurseries, harvesting and grading the final product (Ibid). The report mentions other activities deemed hazardous like the spraying of pesticides (Plan Malawi 2009: 37). The activities have been branded "hazardous" because they involve the use of dangerous chemicals harmful to children's health (Plan Malawi 2009: 37-39; McKnight & Spiller 2005: 602; Nyirenda 2006: 147). Chemicals can affect their respiratory systems (Plan Malawi 2009: 38).

Tobacco production is physically demanding on the children. Children carry heavy loads of tobacco and work for long hours (Ibid). Some children help in operating heavy machinery when preparing tobacco bales (Ibid). The Plan Malawi report indicated that children worked as much as 12 hours or more for just US\$0.17 a day (Plan Malawi 2009: 19, 22). The report also indicates that on humid days, during the cultivation and harvesting of tobacco, the average field worker may be exposed to as much as 54 milligrams of dissolved nicotine, equivalent to more than 50 average cigarettes, leading to Green Tobacco Sickness (Plan Malawi 2009: 39; McKnight & Spiller 2005: 602). Tobacco not only exposes child workers to health hazards involved in its production, but also subjects children to long hours of work with little or no rest at all in order to make more money (Plan Malawi 2009: 15, 16 & 22). Just like the tobacco

industry, employers on tea estates see nothing wrong employing children to perform tasks which they regard as “light and suitable for children and young persons” (Save the Children 2006: 4). Many African traditional communities place a high value on children’s work at home or on the family farm (Wangila and Akukwe 2006: 20). This work is not perceived as harmful, but rather as socially necessary occupation, which is also of great benefit to children’s experience (Ibid). Household activities are carried over to the tea and tobacco estates as they are perceived helpful to both the parents and the children besides earning some money (Ibid).

However what is not deniable is that most of the work that children perform on the tea and tobacco estates in Malawi is not good for their development. It would be of greater significance if the Malawian government were to establish a lower age limit of 12 years of age in the legislation on light work for children as prescribed by ILO Convention 138. Urgent measures to withdraw children from farms where child labourers are exposed to pesticides, toxic substances and nicotine and to prosecute offenders must also be taken. Much emphasis must be placed on the educational development of the children, a factor which will lead to improved human capital on the continent. This, in turn, is likely to contribute to development rather than the continued increase in the number of uneducated people on the continent.

Mauritius

The Doing Business Report of 2012 regards Mauritius as number 1 in Africa and 23rd in the world when it comes to the ease of doing business (World Bank Doing Business (Mauritius) 2012). The report makes no reference to labour standards. This would appear to suggest that the country has no labour violations worth drawing any attention to. However an analysis of the labour standards violations in Mauritius does not appear to suggest that it is fairing any better than its Southern African counterparts in protecting core labour standards in trade). Mauritius has a significant number of export processing zones (EPZs). It has also ratified all eight ILO core labour Conventions (ITUC 2008: 1). However, restrictions of the principles and rights laid down in those binding international legal instruments are common (Ibid). Freedom of association and the right to collective bargaining are guaranteed in law (section 49 of the Mauritius Industrial Relations Act (MIRA) 67 of 1973), and the corresponding rights also apply to workers in companies located in the EPZs (ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius, 2008: 1). However the effective exercise of those rights is systematically denied, causing the ILO’s supervisory bodies to denounce practices that are in breach of the ratified conventions (Ibid). National law allows the public authorities to cancel the registration of a trade union (section

13 of the MIRA), and the procedures established in national legislation on the right to strike are ambiguous (ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius 2008: 1) thus preventing the effective exercise of that right (Ibid). There is still a very low level of collective bargaining in the EPZs, prompting criticism from the ILO which has urged the government to take measures to promote collective bargaining at production centres in the EPZs (Ibid).

Mauritius ratified ILO Convention 87 on Freedom of Association and Protection of the Right to Organise on 1 April 2005 and ILO Convention 98 on the Right to Organise and to Bargain Collectively on 2 December 1969 (ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius 2008: 2). Its Constitution protects the right of workers to form and join trade unions, and this right was strengthened by the ratification of ILO Convention 87 in April 2005 (Ibid). However there are certain restrictions (Ibid). Authorities are entitled to cancel a union's registration if it does not adhere to specified legal obligations, including activities that may pose "a threat to public order" (section 13(d) of the MIRA). The law protects collective bargaining and bans anti-union discrimination (section 52 of the MIRA). Twenty percent (20%) of the active population of Mauritius are members of trade unions (ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius 2008: 3).

The Mauritian Industrial Relations Act (MIRA) guarantees the right to strike (section 92 of the MIRA). However, the MIRA sets a deadline of 21 days following compulsory arbitration for industrial action, which in practice prevents the exercising of that right (section 92(2) of the MIRA). It gives the government 21 days in which to respond to any dispute and to refer it to the Permanent Arbitration Tribunal or the Industrial Relations Commission. If the government does not reply within 21 days the strike can proceed (section 92(b) of the MIRA). The MIRA states that participation in an illegal strike is a ground for dismissal (section 50 of the MIRA). The MIRA also allows the Prime Minister to declare a strike illegal should he or she consider that the strike could damage the country's economy (section 93 of the MIRA).

Foreign workers who take part in a strike can be deported (ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius, 2008: 3). In 2006, there were a series of reports that workers from China and India who had tried to form a trade union or protest against their employers had been summarily deported (Ibid). The unions have demanded that the right to strike be guaranteed by the Constitution (Ibid). The ILO has reminded the government that any restriction of the right to strike should be accompanied by appropriate, impartial and speedy conciliation and arbitration procedures (Ibid). It has stressed that the sacking of workers (for taking part in strikes) and the

refusal to reinstate them were serious breaches of the right to freedom of association (Ibid). The law covers workers in the EPZs, but the unionisation rate is low there (Ibid). Special laws are applied in some EPZs, such as those providing for longer working hours in the zones (45 hours per week and ten hours compulsory overtime if required) (Ibid). Some employer-controlled councils prevent unions from organising workers in companies based in the EPZs (Ibid).

It is extremely difficult to approach workers in Mauritian EPZs with a view to organising them into trade unions (ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius 2008: 3). Generally, union officials have to wait outside the factory gates to meet workers whom they mostly do not know; in addition, they report that most of the workers are women who are in a hurry to get home to their families (Ibid: 4). As a result, the organisation rate is quite low (less than 12%) in the EPZs across the country (Ibid). Owing to the lack of effective trade union representation, occupational health and safety hazards are sometimes not addressed in a timely fashion, if at all (Ibid). The unions have reported how difficult they find it to approach and organise migrant workers, particularly those from South-East Asia and Madagascar, who tend to have long working hours and to be cut off from other workers (Ibid). Some of them have intolerable living conditions, sleeping in dormitories on benches without mattresses or in tiny bedrooms housing up to a dozen people. Those who have tried to organise have been summarily deported (Ibid).

It has also been reported that unions are finding it hard to organise workers in the expanding sector of offshore companies (Ibid). Violations of workers' rights have been reported recently in the textile industry. Some employers have refused to recognise the union delegates and a wildcat strike in a clothing factory was brutally suppressed by the police (Ibid). The government and the unions have still not reached an agreement on the draft law amending the MIRA (Ibid). The unions fear that amendment to the law on collective bargaining could undermine the tripartite system (Ibid). Migrant workers are openly discriminated against as they have much lower wages than Mauritian nationals (Ibid).

The government of Mauritius must therefore do more to promote collective bargaining in enterprises based in the EPZs and ensure that the rights contained in ratified ILO Conventions 87 and 98 are observed in the production centres located there. Measures to ban interference by employers' organisations in the activities of workers' organisations, supported by sufficiently dissuasive sanctions must also be taken. In addition, the labour laws of Mauritius must be amended to remove the right of the Prime Minister to declare a strike illegal should he or she consider that the strike can damage the country's economy.

Measures should also be taken to ensure that migrant workers also receive equal pay to that of Mauritian nationals and that they are fully informed of their rights.

Mozambique

In the 2012 Doing Business Report, Mozambique is ranked 139 out of 183 countries in the world (World Bank 2012). The Doing Business Report for 2012 makes no mention of the relationship between the protection of labour standards and the ease of doing business. This again could indicate a lack of interest concerning the significance of labour standards protection in doing business). Mozambique has ratified all eight core ILO labour Conventions (ITUC 2009: 1). However in view of restrictions on trade union rights, discrimination, child labour and forced labour, further measures are needed to comply with the commitments Mozambique accepted at Singapore and Doha in the WTO Ministerial Declarations of 1996-2001, and in the ILO Declaration on Fundamental Principles and Rights at Work (Ibid: 2). The law allows for strikes in EPZs to be conducted on the same basis as strikes in essential services, although services provided by the export processing zones are not essential (Ibid). It is reported that in the Mozal export processing zone (Mozal is the largest aluminium producer in Mozambique and the second largest in Africa having an annual total production of around 530 000 tonnes. It is located in Southern Mozambique and is owned by the Mozambican government, Mitsubishi Corporation and BHP Billiton), unionists face discrimination and unfair dismissals for going on strike or for trying to organise (ITUC Report to the WTO General Council Review of the Trade Policies of Mozambique 2009: 3). The Mozambique Workers' Organisation (OTM) trade union centre reports that collective agreements are not respected in Mozal (Ibid). However, up to now, there are not a large number of companies operating in Mozal (Ibid).

While Mozambique has ratified both ILO core conventions on trade union rights and progress has recently been made with the enactment of a new Labour Code, the right to bargain collectively is under pressure since the authorities do not take measures requiring employers to respect collective agreements (ITUC Report to the WTO General Council Review of the Trade Policies of Mozambique 2009: 1). Strikes are often suppressed and encounter violent reaction from employers and sometimes the police (Ibid). Anti-union discrimination remains a problem as adequate dissuasive sanctions have not been prescribed (Ibid). Trade unions' ability to operate freely is hindered due to regulations applied to private gatherings (Ibid). Trade union activities in the country's EPZs in Mozal are constrained due to the authorities' definition of work in EPZs as "essential" although clearly it does not fall under the ILO definition of "essential services" (Ibid).

In 1977, Mozambique ratified both ILO Convention No. 100 on Equal Remuneration and ILO Convention No. 111 on Discrimination (Employment

and Occupation) (ITUC Report to the WTO General Council Review of the Trade Policies of Mozambique 2009: 4). Both the Constitution of Mozambique and the law prohibit discrimination against workers on the basis of gender and provide for every worker the right to receive equal salary and benefits for equal work (Ibid). The OTM claims that in the Mozal EPZ, the principle of equal pay for work of equal value is not respected with regard to remuneration of nationals and foreign workers (Ibid). In 2003, Mozambique ratified the ILO Convention 138 on the Minimum Age and Convention 182 on the Worst Forms of Child Labour (Ibid). The law of Mozambique prohibits child labour and sets the minimum working age at 18 years (Ibid). While child labour is not reported in industrial sectors, it is common in practice that children are involved as seasonal labour on family farms, in herding livestock and on commercial cotton, tobacco and tea plantations where they are paid on a piecework basis (Ibid).

The Mozambican government must ensure that strikes in export processing zones are not treated as strikes in essential services sectors. Furthermore the government's listing of "essential services" for which compulsory arbitration is imposed must be amended in order to exclude postal, meteorological and other services that are not essential in the ILO's sense of the term. Measures also need to be taken to enforce collective agreements and promote collective bargaining in the private sector.

Zambia

The Doing Business Report for 2012 ranks Zambia 84th out of 183 countries in the world (World Bank (Zambia) 2012). The report avoids any reference as with previous reports for other Southern African countries does not detail the relationship between the ease of doing business and labour standards. This creates the impression that paying little attention to labour standards could be at the centre of attracting business investments. That the World Bank through its Doing Business Reports pays little attention to labour matters in country specific reports signifies a negative attitude of the institution to a need to create a business-labour interest balance). Zambia has ratified all ILO core labour Conventions (ITUC Report 2009:1). In view of restrictions on trade union rights, discrimination, child labour and forced labour, resolute measures are needed to comply with the commitments Zambia accepted at Singapore, Geneva and Doha in the WTO Ministerial Declarations of 1996-2001, and in the ILO Declaration on Fundamental Principles and Rights at Work (Ibid). Zambia has ratified the ILO Conventions on trade union rights (Ibid). However the legislation on freedom of association and collective bargaining is not in full conformity with ILO Conventions (Ibid). In practice trade union rights are widely flouted in the mining sector in particular, which is dominated by foreign owners (Ibid). In view of the ITUC Report, the

government must step up its efforts to ensure that workers' rights are respected in all companies including foreign companies and subcontractors (Ibid).

In recent years the unions have protested frequently about the worsening social climate in the mining industry, which is mainly owned by Chinese investors who are often accused of intimidating and brutal attitudes (Ibid). The government has not always been responsive. In March 2008, 500 striking workers at the Chambishi Copper Smelter (CCS) were sacked by their employer (Ibid). The day before, seven branch officials of the National Union of Miners and Allied Workers (NUMAW) had been arrested by the police after a conflict broke out between the 500 workers and 200 Chinese foremen, resulting in at least three people being injured (Ibid). The workers, employed to build a foundry, had gone on strike on 3 March to demand pay increases and better safety conditions (Ibid). The union officials were released, and the workers were reinstated after some intensive negotiations (Ibid).

In early June 2008, again in Chambishi, a union member working for another Chinese company, China Non-Ferrous Metal Industry's Foreign Engineering and Construction Company filed a complaint that he was assaulted by an engineer (Ibid). This trade unionist had repeatedly complained about the inadequate financial compensation paid to the family of a worker who died in an occupational accident (ITUC Report to the WTO General Council Review of the Trade Policies of Zambia 2009: 3). After spending a few nights in prison, the engineer was released for lack of evidence (Ibid). The trade unionist was sacked. More and more sub-contractors are found in the mining industry (ITUC Report to the WTO General Council Review of the Trade Policies of Zambia 2009: 4). When trade unions do manage to organize workers in these companies, they have to cope with employers trying to avoid any social dialogue. One specific result of this trend is that the number of occupational accidents, which are often fatal, is rising. The situation faced by foreign workers recruited by foreign investors is not always better. In May 2008, 24 Indians were summarily repatriated to Bombay after being identified as the "ringleaders" of a strike involving over 300 of their compatriots employed by Onshore Construction Company, an Indian sub-contractor hired to build a copper foundry in Chingola (Ibid). The workers were complaining about their pay and working conditions (Ibid).

While disputes are a common feature of labour relations under capitalist conditions, what draws global media attention to China in Africa is the sometimes brutal boss-employee model practiced by the continent's new "imperial masters" (Human Rights Watch 2011). Although China has come a long way in its domestic labour relations, mass social unrest, worker exploitation and walkouts over pay show the ugly side of its rapid industrialization (The Guardian 2011). Cheap labour has entrenched exploitative labour practices

which are now being exported to different countries around the world, some of which have poor labour records of their own (British Broadcasting Corporation 2011). China is no longer just exporting mainly cheap goods, but also cheap labour practices (The Guardian 2011). Chinese exploitation and ill-treatment of workers, sometimes like slaves, is rampant across the Continent, from Cape to Cairo (Human Rights Watch 2011). For instance, in October 2010, two Chinese managers opened fire on hundreds of protesting Zambian miners at Collum Coal Mine (The Guardian 2011). The managers claimed it was in self-defence and the case was dropped. The decision not to pursue the matter meant that there was no justice for Zambians demonstrating against the US\$4 per day wage and unsafe working conditions because China invests more than US\$1 billion a year in infrastructure projects in Zambia (Ibid). The Zambian government should put in place mechanisms to ensure that workers' rights are respected in all companies, including foreign companies and sub-contractors.

Zimbabwe

The World Bank Doing Business Report 2012 ranks Zimbabwe 171st out of 183 countries in the world (World Bank (Zimbabwe) 2012). This report as with the previous Doing Business reports on Southern African countries, serve for Malawi, excludes reference to an analysis of the linkage between the protection of labour standards and the ease of doing business. This again indicates an already developing pattern, which indicates that the need to protect labour standards might not a significant factor to the ease of doing business. This could justify the argument that Bretton Woods Institutions are contributing to the worsening labour conditions in the world as their policies seem not to establish a balance between business interests and a need to protect workers' rights in the course of conducting business). Zimbabwe ratified ILO Convention No. 29 on Forced Labour and Convention 105 on the Abolition of Forced Labour in 1998 (ITUC 2009: 1). The Labour Act in section 4A prohibits forced labour but prescribes only a fine or two years imprisonment which is not deterrent (section 4A of the Labour Act Chapter 28:01 2005). Moreover, the Labour Act fails to address the need for specification of the various forms of forced labour and does not have a definition of forced labour. The Chinese appear to be at liberty to violate workers' rights in the country. A pattern of brutality now exists between the workers, the ruling elite, the Chinese investors, and their managers in Zimbabwe (Marima, 2012). Arguably, the most well-known case involves Anjin Investments, a controversial diamond venture between Zimbabwe's security establishment, the army, police and intelligence services and Chinese investors (Ibid). Through Anjin, top political and security figures have reportedly staked their claim to the Marange diamond fields (Ibid). This has contributed to lack of transparency and accountability in the Marange

diamond mining activities. Diamonds' contribution to the fiscus remains low due to lack of accountability (Ibid). Commenting on the structure of Anjin's management, Farai Maguwu, Director of the Marange-based Centre for Research and Development once said:

Some very senior military personnel and well-placed politicians are directly involved in the mining operations of Anjin. The involvement of the army in diamond mining in Marange is the saddest thing that has happened to the find of the century (Ibid).

Such practices are inconsistent with the objectives of the Kadoma Declaration (KD) (The Kadoma Declaration arose because of the realisation of the Zimbabwean Tripartite Negotiation Forum that it was desirable for Zimbabwe to address the macro-economic issues causing the economic meltdown in the country. It entered into force on September 4, 2009. It carried the theme, "Towards a Shared National Economic and Social Vision"), entered into by government, business and labour to address the totality of the macro-economic problems and Country Risk Factors (See the preamble of the Kadoma Declaration). The KD identified elements of risk in the country to include the real or perceived selective observance of the rule of law (Article 3(iv) of the KD). It also identified one of the country risk manifestations as the commercial risk in which trading partners lack confidence in the investment policies of the country (Article 2(ii) of the KD). The KD also identified one of the risk factors as the lack of respect for human rights (Article 3(c)(12) of the KD). In his keynote address on the official opening of the Tripartite Negotiating Forum (TNF) social dialogue retreat held in Kariba in July 2009, before the signing of the KD, the late former Zimbabwean Prime Minister, Morgan Tsvangirai, said:

After almost two decades of relative stability and growth since independence in 1980, our macroeconomic indicators started to deteriorate, evidenced by soaring inflation and unemployment rates. It is also then that our negative balance of payments situation and recurring budget deficits became untenable. On the back of such economic performance, most businesses inevitably folded, leading to massive retrenchments and liquidations. Given this myriad of challenges, government and social partners decided to build partnership as a way to arrest further collapse (See the keynote address by the former Prime Minister of the Republic of Zimbabwe, the late Morgan Tsvangirai on the 17th of July 2009: 4).

However, the objectives of the KD and any hopes of re-building the country's economy seem to be eroding under the Chinese wave. Extensive research by international organisations such as Human Rights Watch and Global

Witness shows that since its diamond mining venture began in Zimbabwe in 2009, a litany of abuses have also characterised Anjin's operations. In a report released in August 2011, Human Rights Watch noted with concern that, "Zimbabwe police and private security guards are shooting, beating and unleashing attack dogs on poor, local unlicensed miners" (Human Rights Watch 2011). It is alarming that such violent methods of policing mines have become habitual practice in Marange since 2008 when 20 000 small-scale miners invaded newly-discovered fields before being removed by military force (The Human Rights Watch Country Summary Report on Zimbabwe of January 2011: 2). Soldiers and police forcefully removed the local unlicensed miners; rights groups claim that an estimated 200 people were killed, but the government strongly denied this (Ibid).

In a separate incident, workers at a glass-making factory in Harare accused its Chinese owner of forcing them to work overtime for as little as US\$1 per hour (Marima, 2012). It appears some politically connected Chinese firms are exempted from abiding by the country's laws (Ibid). Maintaining good diplomatic relations is crucial to sustaining US\$500 million worth of Chinese investments in Zimbabwe, but when the apparently "great friend of Africa" also starts to look like a brutal extractor of wealth, protecting the rights and interests of ordinary Africans must become critical (Ibid). This is a principle factor, which developing countries appear to constantly ignore.

Zimbabwe has also ratified the ILO Minimum Age Convention (Convention No. 138 (1973)) and Convention No. 182 on the Worst Forms of Child Labour in the year 2000 (See section 11 of the Labour Relations Act Chapter 28:01). Zimbabwean law sets the minimum age for admission to employment at 15 years of age (ITUC Report to the WTO General Council Review of the Trade Policies of Zimbabwe 2009: 9). However, the law does not prescribe for compulsory education up to the age of 15 or other age (section 11 of the Labour Relations Act Chapter 28:01). Also, the LRA does not apply to self-employed workers (Relevant to this, a 2008 ILO-IPEC Draft Rapid Assessment Survey on the worst forms of child labour found that 87 per cent of working children were self-employed). Children between 13 and 15 years old can be employed as apprentices and children between 15 and 18 can perform light work (section 11(1)(a) and (b) of the Labour Relations Act Chapter 28:01). Permitting the employment of apprentices from the age of 13 years is not in conformity with Convention No. 138 (See Article 6). The LRA does not define child labour and does not cover many children's rights recognised in Convention 182 on the worst forms of child labour (ITUC Report to the WTO General Council Review of the Trade Policies of Zimbabwe, 2009: 9). Hazardous work is prohibited for children (See section 11(4) of the Labour Relations Act Chapter 28:01).

In practice, child labour is a problem in Zimbabwe. According to the latest state statistics, from 2004, 46 per cent of children between 5 and 17 years of age were at work (ITUC Report to the WTO General Council Review of the Trade Policies of Zimbabwe, 2009: 10). The data showed that 4 per cent of working children had never attended school and 14 per cent had dropped out of school. The Zimbabwe Congress of Trade Unions (ZCTU) reported that young children engaged in work to pay for their school fees and proposed the reintroduction of free education at least at the primary level (Ibid). Rural children often work in tobacco, sugarcane, cotton, tea and coffee plantations and other farms as well as in diamond and gold mines and in forestry (Ibid). In many cases, children as young as 12 years old have been found in mines dealing with hazardous chemical and toxic substances without protective gear and operating dangerous machines without training in agriculture and mining (Ibid).

Zimbabwe's Export Processing Zones Act (ZEPZA) was enacted in 1995 (See the Zimbabwe Export Processing Zones Act Chapter 14:07 1995). It provides, among other things, for the establishment of EPZs and an EPZ Authority. The EPZ Authority was created in response to the need to develop a high value-added, export-oriented and technology-driven economy through the instrumentality of EPZs. The Authority facilitates the development of EPZs by granting permits to private developers and investment licences to companies, and monitors the EPZs based on guidelines set out in the ZEPZA. EPZs provide clear benefits to foreign investors. However, the ZEPZA provides for the non-application of the Labour Relations Act. It excludes key parties and authorities concerned with labour, basic health, and environmental standards from the EPZ Authority (Section 56 of the Act reads as follows: "1) The Labour Relations Act (Chapter 28:01) shall not apply in relation to licensed investors operating and employees employed in an export processing zone. 2) The Authority may, in consultation with the minister responsible for the administration of the Labour Relations Act (Chapter 28:01), provide rules for conditions of service, termination of service, dismissal from service, and disciplinary proceedings that apply in export processing zones").

The picture presented above of the selected SADC countries is worrisome. Clearly apart from South Africa, regardless of its current challenges concerning a social clause, not much is being done to suggest that there is concern regarding a need to protect core labour standards in trade. This raises a serious question as to whether policy makers in the region have a justifiable basis for regarding the inclusion of a social clause in the WTO as a North-South debate. Perhaps the SADC policy makers fear that their countries could suffer from the effects of incorporating a social clause in trade agreements. However, it is important to establish whether or not these fears are genuine.

Who is disadvantaged by the Exclusion of a Social Clause from Trade Agreements?

This part of the chapter will show that SADC countries are finding it difficult to protect labour standards in trade-related activities/sectors. All this is taking place regardless of the adoption by the International Labour Organisation (ILO) of the 2008 Declaration on Social Justice and Fair Globalisation. The root cause to such an approach will be investigated. It will be shown that there is an apparent desire to retain the low level of compliance with labour standards as a competitive advantage. On the one hand governments are clearly determined to attract investment and increase their export competitiveness on the backdrop of a lowered compliance with labour standards whilst on the other hand multinational companies (MNCs) are also seeking out the most favourable business environments defined by a lowered compliance with labour standards among other variables.

Countries are clearly finding it difficult to protect labour standards in trade. All this is taking place regardless of the adoption by the International Labour Organisation (ILO) of the 2008 Declaration on Social Justice and Fair Globalisation (ILO 2008: 3). There is an apparent desire to retain the low level of compliance with labour standards as a competitive advantage. On the one hand governments are clearly determined to attract investment and increase their export competitiveness on the backdrop of a lowered compliance with labour standards whilst on the other hand multinational companies (MNCs) are also seeking out the most favourable business environment defined by a lowered compliance with labour standards among other variables (Mintz-Habib 2009: 39). This has resulted in SADC countries competing for investors on condition of concessions which are likely to hamper development. An analysis of some of the key issues emerging from discussions of the violations of core labour standards in trade as undertaken in this chapter will possibly inform SADC countries on the appropriate course of action to adopt concerning the social clause.

Lowering Labour Standards in Order to Attract Investors

The Namibian Ramatex case illustrates the dangers of SADC countries lowering labour standards in order to attract investors (The Malaysian Ramatex was established in Namibia under the Africa Growth and Opportunity Act (AGOA) in 2001). In 1995, the Namibian Government introduced the Export Processing Zones (EPZ) Act 9 of 1995. Amongst other incentives such as tax holidays, exemption from import duties on imported intermediate and capital

goods, free repatriation of profits given to lure investors (Jauch 2006: 214), the Namibian government provided that the Labour Act of 1992 would not apply to the EPZ sector (Ibid). The government saw the non-application of labour laws in the EPZ sector as a delicate compromise in order to create employment (Cappuccio 2006). However, the National Union of Namibian Workers (NUNW) (The National Union of Namibian Workers (NUNW) is a national trade union federation in Namibia. It was founded on 24 April 1971 by the then in exile, South West Africa People's Organization (SWAPO) and remains closely linked to the party. SWAPO has been the governing party in Namibia since achieving independence in 1990) challenged the exclusion of the labour laws in EPZs the result of which was a compromise to the effect that labour laws would be allowed to apply in the EPZs with strikes and lock-outs being outlawed for a period of five years (Zampini 2008: 6).

In 2001, the Namibian Ministry of Trade and Industry claimed to have won a N\$1 billion project ahead of South Africa and Madagascar which had also been considered as an investment location by Ramatex (Ibid). This was achieved by offering even greater concessions than those offered to other EPZ companies and an incentive package which included subsidised water and electricity, a 99-year tax exemption on land use as well as over N\$100 million to prepare the site including the setting up of electricity, water and sewage infrastructure (Cappuccio, 2006: 3). This was justified on the grounds that the company would create three thousand to five thousand jobs during the first two years and another two thousand jobs in the following two years (Zampini 2008: 6; Jauch 2006: 214). Considering that Ramatex employed up to seven thousand workers at N\$500 per month, the subsidy was equivalent to 34 months' wage bill (Ibid).

In 2003, five thousand jobs were created in Namibia whilst Ramatex closed its Tay Wah Textiles and May Garments operations in South Africa (Naruseb 2005). Two thousand five hundred jobs were lost in South Africa (Jauch 2006: 214). In 2005, two thousand more jobs were created in Namibia but they were for mostly migrant workers from Asia (Jauch 2006: 215. See also Labour Resource and Research Institute "Asian Migrant Workers at Ramatex" Report prepared for the International Labour Rights Fund 2005). According to Zampini:

In 2008, workers were told to go home at 16h00, due to a power failure at the plant. When they returned the next morning they found the factory gates closed and were told that Ramatex had closed operations. Upon pressure by the Namibia government they receive one month's severance pay and one week's wage for each year of service (Zampini 2008: 6).

Cappuccio also observed that Ramatex's operations in Namibia were fraught with complaints concerning poor labour practices related to low wages, unfair labour conditions and poor occupational health and safety standards (Cappuccio 2006: 4). What then did Namibia gain from pricing investors away from South Africa with lowered concessions to attract investment? Zampini observed that the:

Beggar-thy-neighbour' investment incentive competition may even distort the international allocation of FDI away from destinations with a potentially higher return in terms of development and to investors, as well as a reduction of world efficiency and welfare as compared to the level which could be attained if countries agreed not to pursue such policies (Zampini 2008: 4).

Zampini's comments were in apparent reference to the withdrawal of Ramatex's subsidiary firms from South Africa resulting in the loss of two thousand five hundred jobs. The net effect of Ramatex's business practices and the Namibian government's concessions was the loss of an estimated total of nine thousand five hundred jobs between South Africa and Namibia in addition to the huge financial losses incurred by the Namibian government in setting up structures to lure Ramatex. Does such an approach lead to sustainable development? The Ramatex case draws similarities to the Chinese companies' threats to re-locate from South Africa to Lesotho and Swaziland where labour standards are lower than those currently required in South Africa (Chinese owners of garments factories in Newcastle, Durban made threats to relocate to either Lesotho or Swaziland where there are low labour standards in comparison to South Africa. Without multilateral regulation of a trade-labour linkage, it is going to be impossible to control the behaviour of the Chinese with respect to their low compliance with labour standards in their business practices in the world).

The effects of the Ramatex case were so devastating that the ILO was forced to seriously consider the need to develop feasible governance solutions to the bidding war to attract FDI (Zampini 2008: 7). The result was a FDI Policy Dialogue held in Johannesburg, South Africa, in August 2008 during the SADC meeting of Heads of State and Government (See the ILO and SADC signed a Memorandum of Understanding (MoU) which was renewed in 2008 with a view to addressing issues such as the Ramatex case). Amongst the issues addressed was the question of whether or not there should be a development-friendly regional policy framework for investment. In addressing this question, the factors behind investment decisions and the attraction of FDI had to be established. The ILO and SADC sought to ascertain how the business environment impacts on the relationship between labour standards and FDI.

Since SADC countries are ranked by both ease of doing business indicators and FDI inflows (See the World Bank and the International Financial Corporation: Doing Business Report 2008 and United Nations Conference on Trade and Development (UNCTAD) World Investment Directory, Volume X, Africa 2008. See also World Bank and the International Financial Corporation: Doing Business Reports 2011 and 2012), it had to be established whether there was a link between FDI flows and ease of doing business. Labour argued that contrary to neo-liberal theoretical expectations linking FDI flows to the ease of doing business, there was no relationship between the two (Zampini 2008: 8).

A study conducted by Flanagan and Khor, and published in 2012 established key findings of great significance to this thesis. First, Flanagan and Khor revealed that 19th century globalisation included significant international capital flows, but most FDI flowed from capital-rich European countries to less-developed countries, where capital was scarce and its marginal value was accordingly high (Flanagan & Khor 2012: 275). They also revealed that:

Following the interwar retreat from global economic activity, international capital flows regained their earlier peaks during the 1990s, but with a distinctive change in the destination of investments. Most capital no longer flows toward the least developed nations where capital is scarce. Capital-poor developing countries received less than a quarter of world FDI flows during the late 20th century (Ibid).

In 2003, Obstfeld and Taylor argued that, "...capital transactions seem to be mostly a rich-rich affair, a process of diversification finance rather than development finance" (Obstfeld and Taylor 2003: 175). A 2010 UNCTAD World Investment Report indicated that only in the early 21st century did the share flowing to developing countries begin to increase, although it had reached only a third of FDI inflows by the end of the century's first decade (See UNCTAD, World Investment Report 2010 Annex Table 1). The entire continent of Africa received less than 4% of world inflows in 2007 to 2009, little different from the 1990s (Ibid). The Report also showed that while the volume of FDI received by Asian countries increased throughout the period, their share of FDI inflows changed little over the past 20 years and their share of the flows to developing countries declined (Ibid). The above highlighted data led Flanagan and Khor to conclude that:

Even this snapshot of FDI flows undermines the notion that countries with inferior labour conditions attract international investment flows. With most FDI now flowing between industrialised nations, which offer superior labour conditions, efforts to find cheap labour and weak labour standards cannot be the primary factor motivating the international distribution of FDI (Flanagan & Khor 2012: 275).

The findings of Flanagan and Khor are reflected in the Table 1 below.

Table 1. Foreign direct investment inflows, 1990-2009

	1990-1992	1999-2001	2007-2009
World	100.0	100.0	100.0
Developed countries	75.3	78.1	60.7
Developing countries	24.3	21.1	33.6
East Asia	6.3	8.2	9.9
South Asia	0.3	0.5	2.5
South-East Asia	7.4	2.2	3.2

Source: UNCTAD, World Investment Report 2010.

Flanagan and Khor also tested for the influence of several institutional and regulatory factors that might influence the costs of doing business in a country. Their analysis found that countries with large markets, low investment risks, and a large trade share of GDP attracted larger shares of FDI inflows (Flanagan & Khor 2012: 277). They also found no significant correlation between any of the measures of labour skill and FDI inflow shares (Ibid). They then concluded that, “...at least in the early 21st century, there was no evidence that FDI was attracted to countries with abundant unskilled labour, *ceteris paribus* (All things being equal)” (Ibid). They proceeded to make a preliminary assessment of the effect of national labour regulations on FDI. The result was that countries in which business executives believed that labour regulations do not hinder economic activity received a larger share of world FDI, other influences being equal (Ibid). They also observed that unlike other measures of labour regulation by country, this variable was available for several years, but it provided no indication of which labour regulations concern potential foreign investors the most (Ibid). Flanagan and Khor also tested for the influence of a country’s labour conditions on FDI by adding measures of working conditions and labour rights to the baseline econometric model (Ibid). The results indicated that high FDI shares were not significantly correlated with poor labour conditions such as low pay, long working hours, and limited freedom of association rights (Ibid). This argument is substantiated by the data in Table 2 below.

Table 2. Trade and labour conditions, 2005-2009

Working conditions	In Per capita GDP	Trade share of GDP	Asia	Number of Countries
<i>Hourly Pay</i>	1.36 (.11)	-0.00015 (0.0035)	0.08 (0.26)	48
<i>Annual Work Hours</i>	-152.05 (57.44)	0.85 (-1.29)	-13.96 (107.23)	55
Labour Rights				
<i>Civil Liberties</i>	-0.46 (-0.63)	-0.01 (0.02)	1.94 (1.28)	56

Source: UNCTAD.

The estimates in Table 3 confirm the powerful effect of per capita GDP growth in improving working conditions. The estimates also indicate that trade expansion in early 21st century had only indirect effects on labour conditions via increased per capita GDP. They also reveal that the direct effect of trade expansion on labour conditions is positive. The above detailed information thus leads to the question of whether or not a social clause in the WTO legal framework would harm a developing region like SADC. The discussion follows.

Would a Social Clause in the WTO Core Agreements Disadvantage SADC Countries?

The incorporation of a social clause in multilateral trade agreements has been viewed as a development which will make SADC countries suffer. However, analysis of how a social clause would ensure that child labour decreases and that MNCs comply with labour standards will show that a social clause might not after all result in future economic losses for SADC countries.

The Tripartite Free Trade Area for Africa (TAFTA)

Regional trade agreements now incorporate social clauses to try and fill the gap created by the continuing deadlock in efforts to incorporate a social clause into the multilateral trading system. Whilst debates have been dragging on regarding the effectiveness of social clauses in protecting core labour standards in trade, they can still be viewed as a positive step in trying to address the violation of labour standards in trade. SADC in its founding agreement and later in its Social Charter has also incorporated a social clause in its legal framework. However, the proposed TAFTA, to which SADC is a signatory, appears not to have followed this route. Instead, its framework is clearly devoid of any allusion to a social clause. An analysis will be done to illustrate how developments related to the TAFTA might impact negatively on SADC's commitments to the social clause.

Is the WTO Liable for the Violation of Core Labour Standards in Trade-related Matters in SADC?

The WTO currently does not have jurisdiction over labour standards. The United Nations has added this to its criticisms of the current WTO system and called for a shift to a human rights-oriented approach to trade. This part analyses how the reluctance to protect human rights in trade could have negative effects on development amongst SADC countries.

The incorporation of a social clause in trade agreements has been viewed as a legal arrangement which will make SADC countries suffer. However an analysis of how a social clause would ensure that child labour decreases and MNCs comply with labour standards will show that a social clause might not after all result in future economic losses for SADC countries. This chapter has revealed that child labour is one of the problematic forms of labour violations within SADC. Businesses as already shown in this chapter prefer child labour because it is cheap. SADC governments seem unable to regulate effectively against child labour as doing so is deemed as an act limiting family incomes in the poor region (Freedom House 2011). Such policy options will slow down the rate of elimination of child labour.

Developing country governments and international development agencies have long been aware that human capital accumulation, more than physical capital accumulation, is the mainspring of economic and civil progress (Cigno 2011: 61). However many children in poor developing countries fail to complete even primary education, and some do not go to school at all with child labour being inefficiently high as according to Baland and Robinson, "...parents are either credit or bequest constrained" (Baland & Johnson 2000: 663). Fuwa *et al* (2009) and Pouliot (2006) demonstrated that parents' inability to insure against the risk of a low return causes education investment to be inefficiently low and child labour to be inefficiently high. Beegle *et al* established that parents respond to a negative income shock by making their children work more, suggesting that households cannot insure against that kind of risk either (Beegle *et al* 2006: 80). However, Fitzsimons reported that parents responded in this way to a downturn not in their own income, but in village aggregate income, suggesting that idiosyncratic income shocks are neutralized by informal insurance arrangements at the local level (Fitzsimons 2007: 25). Insuring families against the risk of a downturn in parental income could lead to the reduction of child labour (Epstein & Kahana 2008: 545; Dassy & Rambeloma 2010: 1037).

International trade can positively contribute towards increasing the incomes of parents hence ensuring that children concentrate on education with a view to improving the human capital of their countries which may boost future economic returns than working to increase family incomes for short term gains. However such a development can only produce the intended results if a social

clause is incorporated in trade agreements. The simple reason for this argument lies in the attitude of MNCs and governments towards labour standards in developing countries. Flanagan and Khor made the following observations:

The impact of a multinational company on working conditions in a host country depends on the extent to which it must compete with other MNCs or host country firms for its workers and on the local elasticity of labour supply. If multinationals establish inferior conditions in newly constructed plants, they will face recruiting and retention difficulties when competing with other firms for labour. If they instead acquire local companies and try to worsen working conditions, they will encounter increased quit rates as workers leave to join host country firms offering superior conditions (Flanagan & Khor, 2012: 279).

Flanagan and Khor further noted that:

Whether the arrival of MNCs can improve working conditions depends on labour supply conditions in the host country and the human resource management policies of the firm. In markets with a limitless supply of labour available at the current wage, increased labour demand from MNCs or host country firms will raise employment, but not wages. When workers require inducements to overcome the costs of changing employers, however, labour supply is less elastic, and increases in labour demand from MNCs will raise both wages and employment. When firms compete for labour, the effect of increased demand on wages depends on what workers are willing to accept-not on what firms may wish to pay (Ibid).

Their study led them to conclude that:

If MNCs do not compete with other firms for labour services, they may force labour conditions below competitive levels. Firms in isolated locations, such as some mining districts, may have such-monopsony power, but situations in which labour has no choice of employers seem too rare to accept monopsony as a general phenomenon. Indeed, by adding to the number of employers in a labour market, the arrival of MNCs should improve labour conditions by reducing monopsony power in host-country labour markets (Ibid).

Flanagan and Khor referred to the observations of Lipsey and Sjöholm who observed that, "It seems to be a universal rule that, in every country, foreign owned firms and plants pay higher wages, on average, than domestically owned ones. That is true not only in developing countries, but also in high income countries, such as Canada, the United States and the United Kingdom" (Lipsey & Sjöholm 2001).

Table 3. Ratio of compensation in Multi-National Corporations (MNCs) and local manufacturing in 2000 and 2008

	2000(a)	2008(b)	Average annual % Change
Bangladesh	21.29	19.28	-1.2
Brunei	8.48 a	15.23	11.4
China	7.24	3.10	-7.1
Hong Kong, China	2.24	2.27 b	0.2
India	11.63	11.43 b	-0.2
Indonesia	20.58	13.56	-4.3
Japan (1)	1.36	1.14	-2.0
Korea (1)	2.01	1.73	-1.7
Malaysia	2.66 a	2.29	-3.5
New Zealand (1)	1.24	1.08	-1.6
Philippines	4.99	3.22	-4.4
Singapore (1)	1.46	1.27	-1.6
Sri Lanka	21.25	11.39	-5.8
Taipei, China (1)	1.73	1.69	-0.2
Thailand	4.02	4.05	0.1
Viet Nam	3.62	6.87	11.82

a) 2000 data: Brunei-2001, Malaysia-2004.

b) 2008 data: Hong Kong-2007, India 2007.

Source: ILO

Some of the superior productivity and pay of foreign affiliates reflects differences in industry, firm size, and use of skilled labour (Flanagan & Khor 2012: 280). Nevertheless, many studies find that foreign-affiliate pay premia (on the order of 3% to 5%) remain after controlling for differences in the characteristics of these MNCs and host-country firms (Ibid). The premia themselves may reflect the tendency of MNCs to provide more specific training than host-country firms and other unobserved workforce or management quality differences between foreign and domestic firms (Ibid). Evidence of this practice is reflected in Table 3. As such SADC governments must ensure that their concessions concerning FDI and their policies concerning the protection of labour standards in their countries must be in the best interests of their citizens. Such a principled disposition may ensure that the incomes that families receive are adequate to allow them educate their children leading to human capital investment for the countries and justifying the prohibition of child labour, a development which could lead to future sustainable development. However, concessions such as those made in the Namibian Ramatex case, the state of child labour in the DRC, Zimbabwe and Malawi added to the Chinese trade practices in Zimbabwe, South Africa and Zambia, amongst other issues discussed in this chapter, may not be of great significance for SADC governments in pursuit of their aim of attaining development in their countries.

Conclusion

It may be concluded that a social clause is likely to work in the best interests of SADC countries if they were to fully implement it. However, it is appropriate to question whether or not SADC countries and their African counterparts are ever going to recognise the significance of a social clause, let alone implement it? This question is made all the more important when one considers that the SADC Social Charter's effects are hardly being noticed with working conditions in the region deteriorating and the proposed Tripartite Free Trade Area (TAFTA) for Africa (See the preamble of The Declaration Launching the Negotiations for the Establishment of the Tripartite Free Trade Area for Africa signed on the 12th of June 2011. The Tripartite Free Trade Area for Africa includes member states of the Common Market for Eastern and Southern Africa (COMESA), the partner states of the East African Community (EAC) and the member states of the Southern African Development Community (SADC)) hardly showing any sign of sensitivity to the idea of a social clause. If the picture portrayed by the framework of the TAFTA is anything to go by, then a disturbing truth has been revealed which could depict African leaders as having lost sight of one key vehicle to development (Jansen & Uexkull, 2010: 19. Jansen and Von Uexkull noted that: "Over the past decades trade has played an increasingly important role in the world economy and has contributed significantly to economic growth, both at the global level and within individual countries. Many people have benefitted from trade through increases in wages and household incomes, and this has in particular been the case for those involved in export-related activities"), the protection of core labour standards in trade. There is therefore need to challenge the dominant mechanism of doing business on the African continent at the expense of the workers and to the benefit of foreign companies. A social clause is imperative in African trade agreements.

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The Ethic of Ubuntu and Recent Development in the South African Banking Law

Sipho Nkosi

Introduction

The object of this chapter is to examine the recent developments in the South African banking law particularly with regard to prudential requirements. The ultimate objective of this chapter is to provide solutions to contemporary banking challenges and a seamless banking system for the rest of the African continent and possibly the world. The South African constitutional and legal system is founded on the concept of Ubuntu (See in general Metz 2014; Devenish 2012). Ubuntu is both relational ethic and a corrective solution that is founded on humaneness. It is also premised on humanity, grace, sympathy, empathy, compassion, equity, fairness, justice, and being considerate to fellow human beings. Much of the post-1994 case law in South Africa contains express or implied reference to the concept (See *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC); *Botha v Rich* 2004; see also *Barkhuizen v Napier* 2007 (5) SA 323 (CC), *PE Municipality* (2009) and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC)). Like many European concepts (Western languages (like English, French and Portuguese) are spoken in local African dialects), investment, in the context of banking and other similar institutions, is a foreign to Africa (In accordance with the ethos of ubuntu, there is no such a thing as interest in African customary law. Interest is money charged or exacted for lending or borrowing money, as the case may be. However, the view that there was no commercial activity or entrepreneurial spirit in pre-colonial Africa is not true (See Otto 2016: 99; see also Bekker 2014: 5-30). For that reason, Africans are likely to be caught off guard in the process of interfacing with these institutions. There is therefore a need for the concepts that pertain to and affect the financial industry to be modified, without derogating from their basic essence. There is a need to infuse ubuntu into the current banking practices in order to ameliorate the exploitation that is endemic in the cutthroat capitalist nature of the industry (This is because of high levels of financial illiteracy and lack of knowledge of the niceties and complexities of investment). The economic system of most of the African communities was, before the arrival of the Westerners, based on communalism and communitarianism (Mokgoro

2011). Like many aspects of life, pre-colonial economic activity seems to have been founded on ubuntu: concern one's neighbour, sharing and empathy (Bekker 1989: 338-341). The South African Constitutional Court has defined ubuntu in the following terms:

Ubuntu, a foundational value in traditional African society evades being defined with scientific precision, but that does not preclude it from having particular relevance as principle of legal interpretation...Owing to its emphasis on the community, ubuntu runs the risk of being conflated with communalism. It is important to hasten to a nuance that lies between communalism and ubuntu; the latter is more concerned with the realisation of the uniqueness of each individual in the context of his or her community, while communalism's focus is less on the autonomy of the individual members of the community and more on the collective (Ibid).

Ubuntu, therefore, emphasises the interconnectedness of humanity irrespective of race, colour or creed (Metz 2014; Mbiti 1990: 208 where the author uses the term "naked". This is exactly what happened under colonialism and apartheid: the legal system was used to protect one section of the population, a minority, to the exclusion of another, the majority). As Mbiti puts it, the essence of African (positive) morality is that it "is more 'societary' than 'spiritual'". It is a "morality of conduct rather than a morality of being" (Ibid: 209). It is about "dynamic ethics", not "static ethics" (Ibid). In other words, ubuntu is about abnegation and concern about the welfare of one's community. For that reason, it enjoins members of the community to venture into the world and engage in activities that enhance the condition and dignity of other human beings; and to ensure that justice is served (Ibid). It is important to note that there are many South African maxims (principles) which, if properly translated and understood, could help to give valuable content to ubuntu. This is because these maxims were, for the precolonial black communities, the unwritten Bill of Rights or a moral code which helped to engender a spirit of selflessness and generosity (For some of the criticism of ubuntu, see Bohler-Muller 2012: 367-368; Bekker 2012: 378; Kroeze 2012: 334-338). The maxims were, and continue to be, a part of the living law and legal traditions (Himonga 2011: 44-46) of the different communities, and were (and still are) firmly anchored in their daily experiences. At a social and personal level, the relationships were governed by the maxim *umuntu ngumuntu ngabantu* which means that, "I cannot be what I ought to be until you are what you ought to be." This is almost identical to the words of Martin Luther King Jr in a letter he wrote while he was incarcerated at Birmingham Prison: "Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of

destiny. Whatever affects one directly affects us all indirectly. I can never be what I ought to be until you are what you are ought to be, and you can never be what you ought to be until I am what I ought to be ...” (Martin Luther King Jr, ‘Letter from a Birmingham jail’ in Washington 1992: 85). It continues to emphasise the interconnectedness of humanity (Washington, 1992: 85). In precolonial times, the success of every man and his household depended on his own industriousness and that of his household. The whole family enjoyed whatever harvest there was, and, whenever there was excess, it was shared or exchanged with the immediate neighbours. The latter process took the form of bartering. The head of the household would, for instance, exchange whatever extra maize meal or sorghum he had for a sheep, whether in calf or not. The exchange fostered a spirit of sharing; helped to reduce poverty, and to create a strong social fabric. The economy of a particular community depended on the relational interconnectedness of the individual constituent members. This was, in reality, ubuntu in action (Ibid). As indicated below, ubuntu, and the ethic it represents, seems to have weighed with the South African lawmakers when they enacted many of the consumer protection laws (including banking regulations) (Examples of this kind of legislation are the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008. For instances, sections 100, 101 and 102 of the National Credit Act, all read together, seek to ensure that a consumer is not taken advantage of or overreached by unscrupulous credit providers. It provides a tight, closed list of items that a consumer may be charged in respect of particular credit agreement. There are no such indefinable terms as “surcharge” or “sundry”), particularly after 1994. They sought to ameliorate the financial difficulties that black South Africans were experiencing in the financial sphere and credit market at that time (On the judicial side, the majority judgment in *Nkatha v Firstrand Bank Limited* 2016 (4) SA 257 (CC) para 75-135, on the interpretation of 29 (4) of the National Credit Act 34 of 2005, seems to be an example of the measure of activism required in this regard).

Banking and African Practices

Before the arrival of Westerners (In this context, the term is used to denote people from Britain, Europe and America), the economic system of most of the African communities was based on communalism and communitarianism (Bartering conducted to this type of economic system) (Bartering conducted to this type of economic system). The financial success of every man and his household depended on his own industriousness and that of the members of his household. Any harvest that there was, was enjoyed by the whole family. Also, if there was any excess, that would be shared or exchanged with the immediate neighbours. The latter process took the form of bartering; and it

helped to shield unfortunate neighbours (and relatives) from the shame and embarrassment of penury. The head of the household would, for instance, exchange the extra maize meal or sorghum for a sheep, whether in calf or not. The exchange fostered sharing; ensured a balanced diet among the neighbours and helped eliminate poverty among the indigent. With the arrival of white people in Africa came the concept of money (In South Africa, the first group, the Dutch arrived in 1652 who were closely followed by the French Huguenots; and the British Settlers arrived in 1820). Money was to become the trusted standard bearer of value (which was issued by or on behalf of the government). Black people, therefore, had to find ways of handling and saving the new commodity. One of the ways that they utilised (and still utilise) particularly in South Africa, is the *stokvel* (On this topic, see Schulze 2003: 605-606). The *stokvel* is not necessarily South African (or African) in origin, but it has been adapted in accordance with the spirit *ubuntu* in order to help one another in times of financial difficulty or bereavement (Ibid). In a *stokvel*, a stipulated amount of money (usually a portion of the wages or salary), is paid to a designated member of the group on a rotational (often monthly) basis (Ibid). Despite the increase in the levels of education and sophistication, many black South Africans rely banks and the *stokvel* to save. There seems to be three main reasons for reliance on this phenomenon: (a) it helps them to hedge their bets and spread the risk; (b) it assists in ensuring that their hard-earned money is placed in the hands of a trusted circle of friends; and (c) it provides the members with labour and other resources in times of bereavement. For instance, a few days before a funeral members of the local or block *stokvel* converge at the home of the bereaved family in order to help with the slaughtering of the ceremonial beast, pitching the tent and using their vehicles to run different errands. This kind of help also extends to graduation parties, weddings and other festivities. There is also another practice, which pre-colonial South Africans relied on for economic survival - the *mafisa*-contract (Some black South Africans who live in the rural areas still follow this practice – see Bekker, 1989: 338-341). This is an agreement between neighbours, friends or relatives in terms of which the wealthier one lends his livestock or poultry to the poorer one for use and enjoyment (Ibid). This may include using the animals for ploughing, milk, eggs, feathers or wool (Ibid). However, the agreement contains an implied term on the basis of which the progeny of the animals that lent or borrowed redound to the benefit of the original owner or the depositor (Ibid). In terms of customary law, the depositor is required to show gratitude to the depositary by giving him a beast or two where the latter displayed reasonable care in looking after the beasts. Pre-colonial Africans may not have been charging interest (as it known in the Western world), but it is not true to claim that there was no commerce or entrepreneurship among Africans in pre-colonial times – Bekker, 1989: 57). In

the context of banking, financial institutions need to infuse the ethic of ubuntu in dealing with those of their customers who are on the verge of over-indebtedness but still need household necessities for instance – by granting them some relief, and “forgiving” them a portion of their debts which they may have incurred over specified period.

Though complex and complicated, the relationship between a bank and a customer mirrors that of a debtor and a creditor, with elements of a contract of depositum, mutuum and mandate. This is borne out of the nature of rights and duties that the parties have against each other. The bank’s primary duties are to the following duties: (a) honour customer’s cheques (provided there are sufficient funds available in the customer’s account and the cheque is genuine and complete in all respects); (b) to collect customer’s cheques; and credit his account; (c) abide by the instructions of the customer – subject to terms and conditions; (d) to render statements on request or periodically; (e) manage customer’s account with due care, skill, good faith, and without negligence; and (f) give reasonable notice before closing customer’s account. The bank also has the following rights in relation to the customer: (a) it may set-off any amounts due (owed) by it to the customer against those owed to it by the customer; (b) the bank may exercise a lien in respect of the customer’s securities in the custody of the bank; and (c) the money deposited by the customer becomes the property of the bank, and can use it as it pleases. As already indicated, the bank is entitled to expect the customer to exercise reasonable care in drawing his cheques, to reduce the risk of fraudulent alterations. Further, companies and sophisticated customers are now required to exercise reasonable care in respect of the custody and safe-keeping of cheques, and the reconciliation of statements). In addition to all the other duties that rest on the bank, there is also the duty of secrecy that rests on a bank (In this regard, see *Tournier v National Provincial & Union Bank of England* 1924 1 KB 461 (CA). In that case, Tournier, a customer of the bank, instituted legal proceedings against the bank claiming that one of its employees had disclosed confidential information to a third party about his gambling habit. The court set out the nature and extent of the duty, and the specific situations (exceptions) in which the duty does not arise: (a) where the bank is compelled by law to disclose the information (for example, Financial Intelligence Centre Act 38 of 2001, Prevention of Organised Crime Act, Criminal Procedure Act 51 of 1977 and Regulation of the Financial Sector Act 9 of 2017); (b) where it is in the interest of the public that the information be disclosed; (c) where it is in the interest of the bank itself to disclose that such information be disclosed; or where the disclosure is made with express or implied consent of the customer. The customer, on the other hand, also has rights and duties which arises from this complex relationship: He or she must (a) take reasonable care when operating his current account, but that duty is limited to the following: (i) he or

she must not facilitate fraud or forgery when drawing cheques; (ii) and he or she must inform the bank of any unauthorised cheques drawn on his account, as soon as he becomes aware; (b) he or she must honour all the agreements and undertakings arising from his or her relationship with the bank). This duty seeks to ensure that the information and details pertaining to the customer's account are treated with a great deal of confidentiality (The duty is founded on custom, legislation and the common law. It is important to note that the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") is the supreme law of the country; and, all the laws, customs and practices must comply with its provisions). This is, by nature, a negative duty: it is owed by the bank only to the customer, not to third party. It persists even after the business relationship between the parties has ended (*Tournier* case at 473). However, for policy reasons, the duty does not exist in the following instances: (a) where the bank is compelled by law to disclose the information; (b) if it is in the interest of the public to do so; (c) if the disclosure is in the interest of the bank itself; (d) and where the customer has expressly or impliedly given his consent to the disclosure of the information.

The Banking Prudential Requirements in South Africa

A historical perspective

The financial systems in both the developed and developing world are prone to periods of instability (Falken, 2001: 11; Sharrock, 2016: 98-106). The main causes of this situation seem to be inadequate control systems, weak monitoring processes, and a general lack of proper internal supervision of staff by the banks. This lack of supervision then leads to the banks being used for nefarious activities, which may include fraud and the financing of terrorism. It is for that reason that various governments, all over the world, often insist on legislative and administrative measures (These include the provisions of the Proceeds of Crime Act 76 1996; the Drug Trafficking Act 40 of 1996; the Prevention of Organised Crime Act 121 of 1998 and the Financial Intelligence Centre Act 38 of 2001. These provisions usually provide for the forfeiture of assets which were derived from, or used in the commission of crime. There are plans afoot to amend the Act – see the Financial Intelligence Centre Amendment Bill, 2008) in order to deal with these modern phenomena. As will be shown below, any attempt at combating money laundering and the financing of terrorism requires a great deal of co-operation among the different countries and their governments. All working citizens and business persons of all the countries require a secure and well supervised banking system in order to protect their savings. That demands a great deal of co-operation among different governments in order to encourage a culture of saving (Bester et al, 2003: 1),

entrepreneurship and economic growth among citizens of the world. However, all these developments often create safety and security concerns for the bank officials, governments and their law enforcement agencies. There will be a need to balance the economic needs of the affected members of society with the duty of those elected into positions of power to allay their security concerns, particularly where their hard-earned savings are concerned (Bester *et al* 2003: 65). The quest to combat fraud and money laundering (This is a crime which, in general, “refers to any act which obscures the illicit nature or existence, location or application of (the) proceeds of crime” – De Koker 2007: 1-4; see also Van Jaarsveld 2000: 581; see also Recommendations1 and Recommendations 13-20 of the Financial Action Task Force (FATF). For instance, Recommendation1 enjoins the countries to “criminalise money laundering on the basis of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (“the Vienna Convention”) and [the] United Nations Convention Against Transnational Crime (“the Palermo Convention”) [and] to apply [the requirements and principles pertaining to] the crime of money laundering to all serious offences with the view to including all the predicate offences.” In terms of the Recommendation, predicate offences are those that are proscribed or defined in terms of their seriousness and length and type of punishment that can be meted out) and to prevent the financing and promotion of terrorist activities (There is no better illustration of this kind of problem than the events which happened on 11 September 2001 in New York and Washington, in the United States of America, when two aeroplanes were flown into the Twin Towers, and the military headquarters at the Pentagon, respectively. Incidentally, Brigadier General Thomas Hartmann, the legal advisor to the US Military Commission recently announced the indictment of the alleged mastermind behind these events, KS Mohammed, and four others (CNN Special Report 11 February 2008). It is also no coincidence that barely forty five days after the September 2001 massacre, the US Congress passed and promulgated the long-titled Unity and Strengthening of the United States of America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act of 2001(The so-called “USA Patriot Act”)), has led to the introduction of prudential requirements for banks all over the world. This development had forced financial institutions to introduce client identification and verification systems to deal with this financial scourge (These are the obligations which flow from the provisions of such international bodies as the Financial Action Task Force (FATF) and its Recommendations, the Basel Committee on Banking Supervision (and its Core Principles) and instruments such as United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Convention against Transnational Organised Crime, and the International Convention on the Suppression and Financing of Terrorism).

Now, most banks in the world have rigorous training programmes for their employees and officials (De Koker 2007: 26. This paper was delivered at the 10th Conference of Africanists: Security for Africa: Internal and External Aspects in Moscow 24-26 May 2005. It can also be found in the *Journal of Financial Crime* (2006) 26-50). Needless to say, the process has had varied, and unintended, consequences in different countries - including South Africa (De Koker 2007: 2-4 and 26). The introduction of these prudential requirements and identification systems has had a negative impact (This has led to the phenomenon that is now commonly known as “financial exclusion” or “inadequate access to financial services” – see De Koker 2007: 2-3. The learned author continues: “Persons who are financially excluded do not have bank accounts and long- and short-term insurance products that are normally held by members of society. They are therefore excluded from participation in the financial services industry” – De Koker 2007: 3). In South Africa, especially, the process has mainly affected the poor, unemployed, refugees and the illegal immigrants (See *Business Day* 11 February 2008. The Zimbabweans and Mozambicans and Congolese are the readily available examples of this phenomenon. There are also Ethiopians and Somalis in South Africa who need identity documents but do not qualify to open bank accounts and to start businesses, and make investments for the benefit of South Africans and their families back home, if they are not with them already in the particular host country). Thankfully, in the true ethos of ubuntu, the South African banking and government officials have been responsive (Ibid). A delicate balance seems to have been struck – by South African authorities - between the quest to combat crimes such as money laundering and the financing of terrorism and encouraging black people to save and participate in the economy of the country (Ibid).

The Impact of Global Terrorism on Banking

In order to commit international terrorism (All the international instruments that I could lay my hands on do not define “terrorism”. However, the *Longman Dictionary of Contemporary English* defines it as “a practice of using violence, or threats of violence, to obtain political demands.” Money laundering refers to a transaction or arrangement which is entered into between two or more persons, in relation to some property, the sole purpose of which it is to disguise, the nature, source or location of such property (See section 4(a)(i) of the Prevention of Organised Crime Act. The wording of this section is in line with FATF’s Recommendations 1, 13 and 17). The criminal, fraudster or terrorist often studies the national payment systems of the various countries and continents he wishes to operate in (It is important to note that terrorism may be funded

through a medium other than the financial system – see De Koker 2007: 1-4). Since the occurrence of the events of 11 September 2001, in New York, United States, there has been a noticeable increase in acts of terrorism. This has led to the arrest and detention of people who, on the basis of their country of origin and religious beliefs, have been arrested on suspicion of orchestrating terroristic activities. The geopolitical aspects of that massacre fall beyond the scope of this paper, and will therefore not be discussed. What is important to note, however, is that the role and position of the banks in the world has changed forever (Shapiro 2007: 635). It is also worth noting that a mere forty five days after the tragedy referred to above, President George W Bush, the president of the United States, signed into law, the long-titled Unity and Strengthening of the United States of America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, the so-called “USA Patriot Act” (This comprehensive, and justifiably draconian Act was amended and improved by the USA Patriot Improvement and Reauthorisation Act of 2005, which was promulgated in March 2006. Amongst many other things, the Act provides for: the designation of a compliance officer; (b) the development of internal money laundering controls; (c) regular periodic training [of staff] and (d) independent audits (internal or external) to test the efficacy of the controls in place (31 USC 5318(h))). As Shapiro puts it: “Like it or not, the Patriot Act has conscripted all US banks as frontline troops in a worldwide effort to eradicate money laundering. *With the events of 9/11, the personification of the money launderer [has] changed from drug-dealer to terrorist.*” (Shapiro 2007: 635 (my emphasis)). Needless to say, failure to comply with the provisions of the USA Patriot Act will result in very severe punishment (For instance, a fine of \$1, 000 000-00 (about R 15 000 000-00) may be imposed on a bank which does not comply with the provisions of the Act (31 USC 5322)). This also helps to explain the siege mentality, and mode, that the banking sector all over the world went into after the incidents of 2001. It is in this context that this chapter seeks to examine the nature, extent what the impact the international banking prudential requirements has been on countries such as South Africa. The obvious consequence has been the proliferation of international instruments (Convention on Transnational Organized Crime; the Convention Against the Illicit Traffic of Drugs and Psychotropic Substances (the so-called “Vienna Convention”); Basel Committee on Banking Supervision’s Core Principles), bodies (One of those bodies is the FATF, an inter-governmental task team which was formed to develop and promote policies to combat money laundering all over the world. It has since come up with the so-called Forty Recommendations in 1990. These were revised in 2003. Nine additional Recommendations were included to the original ones in 2001 and 2004 respectively. There is also the International Organization of Securities

Commissions, the Basle Committee on Bank Supervision and the International Association of Insurance Supervisors). The development has, obviously, placed an obligation on the legislatures of many countries of the world, including South Africa, to enact laws (See the provisions of the Prevention of Organised Crime Act 121 1998; see also the Financial Intelligence Centre Act 38 2001 Prevention and Combating of Corrupt Activities 21 of 2004 Act and the Protection of Democracy Against Terrorism and Related Activities 33 of 2004) the main objective of which it is to combat money laundering and terrorism. This obligation flows from the country's own obligations as part of the comity of nations, and from instruments such as the Convention on Transnational Organized Crime, 2000 (Article 7(1) thereof enjoins the Participating States to each institute an internal regulatory or legal framework with the view to combating money laundering with more emphasis on customer identification, record-keeping and the reporting of suspicious transactions). The enactment of the Financial Intelligence Centre Act 38 of 2001 is an example of the implementation of this kind of international obligation. The Preamble to this Act states its objectives as being "to prevent money laundering; and to provide for an obligation [on institutions such as the banks] to report certain information" (See also, in particular, sub-sections 26(1), (2) and (3) thereof). However, the Act seems to be lacking in administrative and procedural processes and structures (Van Jaarsveld 2000: 580, 581). It should be noted that that the South African legislature has been forward-looking in this regard. This is evidenced by the pieces of legislation which predate the United Nations Convention on Transnational Organized Crime, such as the Drugs and Drug Trafficking Act 40 of 1996; Proceeds of Crime Act 76 of 1996 and the Prevention of Crime Act 121 of 1998.

Banks and Fraud

International instruments

To commit crimes such as money laundering, the criminal requires legitimate financial markets and other financial intermediaries (De Koker 2007: 3). Since the events of the 11 September 2001, in the United States of America, the personification of the money launderer has changed from that of a dealer in narcotics to that of a terrorist (See Shapiro 2007: 629; 635) the banks feature prominently, albeit reluctantly, in these illegal activities (As to what constitutes a "bank" and the "business of a bank", see section 1 of the Banks Act 94 of 1990; and the Bills of Exchange Act 34 of 1964). He will then use the particular national payment system that the country affords him, in order to "wash" the "dirty money" he may have procured through illicit means (Van Jaarsveld 2000: 581-582; see also De Koker 2007: 3). The obvious intention of the criminal in

committing that crime, is to ensure that the money is moved as far away from its original source as possible, and that it becomes somewhat difficult, if not impossible, for anyone to trace it back to a particular criminal activity, be it money laundering or the financing of terrorism (See Shapiro 2007: 630; see also De Koker 2007: 3; see also Van Jaarsveld 2000: 581-582). Property (Shapiro 2007: 630), a prized commodity for investment in the eyes of the banks is, ironically, the most common vehicle which is used by fraudsters and terrorists to disguise their ill-gotten gains (Hence the requirement that banks seek proof of the funds from which the transactions of this nature would be financed – see the amended section 21 of the Financial Intelligence Act 38 of 2001). The banking system provides a semblance of propriety and legality to the unsuspecting bank officials. And, the process is usually carried out in three stages (Shapiro 2007: 630): (a) placement, which constitutes the initial stage of introducing the money to the banking system; (b) layering, which involves depositing the money (in small if negligible amounts) into an account which has been opened for this specific purpose and; (c) integration, which entails ensuring that the dirty money is completely washed, and it is no longer traceable to its original, criminal source (This, however, is an unsatisfactory way of looking at this problem. Each of these stages may constitute a self-contained crime - see De Koker (2007), Com 1-5-7 where the learned author says that more value could be derived from this exercise by viewing placement, layering and integration not as stages in a process, but as different objectives of the money launderer. In other words, each of these stages may, on its own, constitute a complete crime of money laundering).

Among other developments, the advent of democracy in South Africa and the bombing of the Trade Centre in New York in 2001 have necessitated the introduction of stringent prudential measures to curb money laundering and terrorism. These measure now require bank officials to properly identify each person who intends to open an account, and to verify every piece of information that he provides to ensure that the customer is indeed who he says he is (See s 21 of the Financial Intelligence Act 38 of 2001; see also De Koker 2007: 4-6). In other words, bank supervisors around the world are increasingly being encouraged, and in many instances obliged, to ensure that the banks put in place controls and procedures which place them in a position to properly identify their customers, and that the information they provide is, or can be, positively identified (In terms of the amended s 21 of the FICA, this process is now known as the “Risk Management Process”. See FATF’s Recommendations 1, 5, 13, 19; see also the Basel Committee on Banking Supervision’s Paper on Customer due diligence for banks (October 2001):

www.almcft.com/Basel/%20Customer%20Due%20Diligence.pdf.

These include (a) customer acceptance policies, (b) customer identification, (c) on-going monitoring of high risk accounts and (d) risk management – see the Committee’s Core Principles, particularly Core Principle 15 which provides that the banking supervisors must determine whether there are policies, practice and procedures in place, including the “know your customer” rules, whose purpose it is to promote high ethical and professional standards in the financial sector, and to prevent the banks from being used, intentionally, or unintentionally, by criminal elements). Without the implementation of these measures, or if there is a lack of consistent insistence on due diligence, the banks and other similar institutions could become exposed to reputational, operational, legal and other risks (The Basel Banking Supervision Committee’s Paper on Banking Supervision and Customer Due Diligence (n 3)8 1; see also FATF’s Recommendation 10 and 11 and 12. The provisions of Recommendation 12, in particular, provide that whatever records the banks may be having on their customers, should be kept for a period of five years. In the South African context, the provisions of the Financial Intelligence Centre Act (FIA) are important, particularly sections 27 and 28 because they have been modelled on these instruments. For instance, the provisions of section 28 of the FIA create a duty for the reporting institutions - which include banks - to report suspicious transactions, and certain payment transactions which exceed a particular threshold to the Financial Intelligence Centre. Section 40 of the FIA also provides for such information to be made available to the law-enforcement agencies for investigative purposes. In fact, section 23 of the FIA provides for the information to be kept at the Centre for a period of five years). It is this kind of risk that bodies such as the Financial Action Task Force (The main focus of this body, if not its only focus, is the identification and prevention of money laundering) and the Basel Committee on Bank Supervision were intended to combat, and to ensure market integrity within financial sector (At local level, South Africa has, in terms of the Financial Sector Regulation Act 9 of 2017, created new bodies, for this purpose: the Prudential Authority in which the Reserve Bank of South Africa is now housed (Chapter 3; and the Financial Sector Conduct Authority (Chapter 4). From the preamble, the purpose of the FSRA is “to enhance and preserve financial stability in the Republic [of South Africa]).

Recent Developments in South Africa: The Legislative Framework

Most of the international instruments and national laws that are the subject of this chapter were conceived and enacted in order to protect financial institutions from reputational (This kind of risk may lead to a “run on the bank” with the customers demanding to withdraw their money simultaneously, with the result that the bank fails to meet its commitment on that particular day, or

in that week or month. This is what happened in South Africa when some of the banks were placed under curatorship. It was the Islamic Bank in 1997, Saambou Bank Limited in 2002 and the African Bank Limited, first in 1995 and again in 2014. Curatorship is a process reserved for financial institutions. It is almost similar to judicial management that, in turn, has since been replaced by the business rescue procedure in terms of Chapter 4 of the Companies Act 71 of 2008. As Arora “The Statutory System of Banking Supervision and the Failure of BBCI” *The Journal of Business Law* (2006) 487 489 puts it: “The primary objective of bank regulation, therefore, [is] to prevent contagion and systematic risk which could threaten the stability of banking”; see also Bester *et al* (n 3) 64-65. In the South African context, Reg. 22 and 23 of the Money Laundering Control Regulations will, to a great extent, help achieve these goals): (a) the money value of the transaction; (b) the use of legal persons as fronts; (c) cross-border wire transactions; (d) the complexity and unusualness of the transaction; (e); political exposure of clients of the bank; (f) large cash transactions; (g) counterfeit bank notes and;(i) the misuse of new and developing technologies. South African law criminalises money laundering through three separate Acts of Parliament. The first one is the Prevention of Organised Crime Act 121 of 1998, which covers the conversion, or concealment or disguise, or acquisition of property in manner consistent with the United Nations Convention the Traffic of Illicit Drugs and Psychotropic Substances, 1998 (The “Palermo Convention”), and the United Nations Convention Against Transnational Organised Crime, 2000. The second one is the Protection of Constitutional Democracy against Terrorist and Related Act 33 of 2004 (It is known by the acronym PROCDRATA). Section thereof criminalises the collection or provision of property with the intention that it be used in the commission of terrorist act by an individual or an organisation (For instance, see s 1(a) of PROCDRATA where “terrorism” is defined, particularly paragraph (xx)(vi)(bb)(cc)(ff) which relate to telecommunication services, baking services and infrastructural facilities. S 4 of PROCDRATA criminalises the financing of terrorism and terrorist activities). The third one is the Prevention and Combating of Corrupt Practices 21 of 2004, also known as PRECCA. The fourth one is the Financial Intelligence Centre Act 38 of 2001 (In this regard, see Sharrock, R., (2016), *The Law of Banking and Payment in South Africa*, 98-106, and the authorities cited therein. There is also a raft of anti-money laundering (AML) and the combating of terrorism financing control (CTFI) regulations which are intended to help in the enforcement of the provisions of the Act). It is important to note that FICA was amended in 2008 in order to address the concerns raised in 2008 by the Financial Action Task Force (FATF) mutual evaluation conducted on South Africa in the same year. While the primary purpose of POCA is to outline the parameters of what really constitutes money

laundering, the *ratio legis* of FICA is to set out effective measures on how to detect and suppress money laundering. It is important to note that section 21 FICA (together with the accompanying anti-money laundering (AML) and combating of the financing of terrorism and terrorist activities regulations CFT) was amended in 2017 (In terms of s 9 of the Financial Intelligence Centre Amendment Act 1 of 2017. The Amendment Act was assented to by the former President of South Africa, Mr Jacob G Zuma on the 26 April 2017). The promulgation and implementation of the AML and CFT regulations has had a direct effect on the manner in which banks now have to conduct their business (Sharrock et al, 2016: 77, 98-99). Consequently, the banks have a seemingly onerous duty resting on them. In accordance with their own stringent Risk Management and Compliance programme, banks must verify the identity. The customer must produce his identity document in terms of reg 4. This is because the bank is required to obtain the following information pertaining to the customer: his or her full name, identity number, date of birth, residential address and his or her tax registration number. In the case of foreign nationals, the banks also obtain details with regard the customer's nationality and passport number in terms of reg 5. However, the regulations permit the bank managers to exercise their discretion and rely on other documents in order to verify the identity of a potential customers who, without fault on their part, do not have the official South African identity document. That document should reflect the following details: a photograph of the customer; his or full name, or his or initials and surname; date of birth, and his or her identity number. It is important to note that there is even no need for foreign nationals to prove that they are in South Africa legally; nor are they required to produce their work permit or proof of residence - see reg 4 (a)(ii); see also Sharrock et al (2016) 100-101) of a (prospective) customer (Section 21 (1)(a). In instances where the customer is representing another person, the customer's identity and the authority to act for that other person must be established and verified (section 21(1) (b); and where another is represented by another person, the identity of that person must be established and verified (section 21(1)(c)) before establishing a business relationship, or entering into a single transaction (An example of this once-off transaction could be one between a South African importer who has bought a consignment of shoes from Italy, and approaches a bank in order to submit Letter of Credit to the bank) with him or her (These used to be referred to as "Customer Due Diligence (CDD)" measures. This is because the banks are included in the definition of, "... accountable institutions" in the First Schedule to the Financial Intelligence Centre Act 38 of 2001. And, failure to comply with these provisions is a serious offence; and on conviction, the accused bank official may be sentenced to a period not exceeding 15 years' imprisonment, or a fine of R100 000). The Financial Intelligence Amendment Act has inserted

important provisions which impose added responsibilities on the banks. Section 21F and 21G are intended to ensure that only senior managers of a bank are involved in the establishment of a business relationship with a certain, special category of customer: (a) a foreign prominent public official (See section 21F) (b) and, a domestic prominent influential person (See section 21G). These two provisions, which are almost on all of fours with each other, contain the following requirements: (i) the Risk Management and Compliance Programme still has to be complied with; (ii) a senior manager must be involved in the establishment of such a business relationship (or the conclusion of a single transaction); (iii) the source of the customer's income or funds also has to be determined; and (iv) that business relationship has to be subjected to "continuous monitoring" (These provisions also apply to family members and known close associates of this type of customer).

Exemption 17

Exemption 17 was intended to help banks, as accountable institution in terms of the Financial Intelligence Centre Act strike a balance between ensuring stringent prudential requirements and allowing less fortunate customers to access banking and other financial services. The primary purpose of Exemption 17 is to relieve certain accountable institutions of the duty imposed by s 21 of FICA: that of verifying the residential address (By, for instance, requiring him to produce one, some or all of the following documents: a Deed of Sale in respect of the purchase and sale of an immovable property; a lease agreement in respect of a lease property; a statement of rates and taxes from the local municipal council or any other document that might assist the bank in this regard) of the customer. Where all the jurisdictional facts set out in s 21 are met, the bank does not have to insist that the customer produce proof of residence, or registration for tax purposes (Sharrock et al, 2016: 105). The jurisdictional facts are that:

- a) the institution must have all the money laundering measures in place;
- b) the customer must be a South African citizen or resident;
- c) the payments, withdrawal and transfers from the account must not exceed a R5000 a day; or R25000 a month; and
- d) the customer must also not make transfers (This refers to cell phone-banking products such as ewallet and mpesa) to any destination outside of South Africa except where -
 - i. it is a point-of-sale payment (EFTPOS) (For instance, paying into an account held in Zambia);
 - ii. it is a cash withdrawal in a Rand Common Monetary Area (The Zone comprises Swaziland, Botswana and Lesotho).

iii. the balance in the account of the customer may not, at any one time, exceed R25000 (If a customer falls outside of the scope of the Exemption 17, then a different financial product should be recommended. The assumption seems to be that such a person who to spend more than the stipulated threshold, then they can afford a “decent” place of abode).

The Financial Sector Regulation Act 9 of 2017

In its quest to combat financial crimes such as money laundering, fraud and corruption, on the one hand, and to comply its international obligations with regard to prudential requirements, the South African parliament has enacted another piece of legislation: the Financial Sector Regulation Act 9 of 2017 (The preamble to the FSRA sets out its purposes, among others, as being to “preserve and enhance financial stability in the [South Africa] by conferring powers on the Reserve Bank; to establish the Financial Stability Oversight Committee; to regulate and supervise financial product providers and financial services providers; to improve market conduct in order to protect financial customers...”). The FSRA is based on the Twin Peaks approach which is a very “comprehensive and complete system for regulating the financial sector” (To read this and all the other related documents, see <http://www.treasury.gov.za/twinpeaks>). The system was intended to give effect to a South African government policy paper published in February 2011 titled *A safer financial sector to serve South Africa* (Ibid). The purpose of the FSRA is, *inter alia*, to create and confer powers on new regulatory bodies such as the Prudential Authority (See Chapter 3 (s 32-55) of the FSRA) (under whose authority the Reserve Bank of South Africa will now fall) (Needless to say, the Reserve Bank has not been abolished. The Act actually obliges the old and the new regulatory bodies to cooperate and collaborate with the Reserve Bank whenever they exercise their powers in terms of the National Credit Act and the Financial Intelligence Centre Act 38 of 2001 – see s 34 (1) (b); see also s 76 (1) (a)-(g)) and the Financial Sector Conduct Authority (It replaces the Financial Services Board. Its establishment, structure and powers are set out in Chapter 4 (s 56-75) of the FSRA). The main purpose of the FSRA seems to be to eliminate all risks that may threaten the country’s financial system and to ensure the integrity of its financial products and services, and thereby protect the consumers of financial products (In this context, “financial stability” entails that: (a) financial institutions generally provide financial products and financial services, and market infrastructures generally perform their functions and duties in terms of financial sector laws, without interruption; financial institutions are capable of continuing to provide financial products and financial services, and market infrastructures are capable of continuing to perform their functions and duties

in terms of financial sector laws, without interruption despite changes in economic circumstances; and (c) there is general confidence in the ability of financial institutions to continue to provide financial products and financial services, and the ability of market infrastructures to continue to perform their functions and duties in terms of financial sector laws, without interruption despite changes in economic circumstances. This includes a situation where financial stability is restored after it had been adversely affected). The FIA also makes provision for the entities and bodies in respect of which prudential standards must be set (See section 105-110).

Conclusion

Since the arrival of white people in Africa, Africans have had to adjust to and grapple with the concept of investment in the context of banking. They had to understand that bartering has been supplanted by Western ways of investment and trading the technology, and also try and comprehend intricacies that are associated with the business of banking. The banks themselves have had to deal with financial crimes such as fraud, corruption and money laundering which continue to present systemic and reputational risks to them. It is for that reason that they have been compelled to adhere to internationally accepted prudential requirements which are primarily intended to protect both national and global economic and financial interests. This has included a dedicated focus on terrorism and related activities in order to ensure that the respective banking systems are not used for nefarious or terroristic activities.

However, from the prior stated, it is clear that the South African government and the banking and financial industry have been trying to strike a delicate balance between complying with prudential requirements, thereby ensuring its integrity on the one hand, and infusing into it the fundamental constitutional value of ubuntu of sympathy, empathy, social cohesion and contractual justice, on the other. This is exemplified by legislative provisions which have ensured that even the less fortunate of citizens (and residents) have access to appropriate banking and financial services, and are able to participate in the economy. Financial institutions may have to infuse the ethic of ubuntu in dealing with those of their customers by, for example, granting them debt amnesty or reprieve from time to time.

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Decolonisation and the Constitutional Right to Fair Labour Practices: A Contemporary South African Perspective

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Powerful corporations ..., with their tax avoidance have taught us that for them, profit is king. It means responsibility to the communities that serve them are, at best, secondary concerns. Ones that always defer to the more pressing need of acquisition. This is empire building wholly colonial in spirit. This is capitalism as we currently practice it (Okolosie, 2016).

Introduction

Discourses on the decolonisation of Africa have assumed urgency in contemporary African societies. This has been largely informed by an undying need to unyoke African societies from the crippling vice grip of colonisation and its subsequent post-colonial negative effects. Colonialism was characterised by the scramble for Africa which took place between 1870 and 1900. This brazen theft and dispossession of Africans of their resources led to the greater part of Africa being unjustly controlled by European states. Such European states seized as much land as possible from the defenceless Africans and subjected them to slavery, with little or no entitlements accruing to the dispossessed African indigenes. The economic legacy of colonialism in Africa has thus been negative and still continues as such to date, with African workers still being subjected to employment conditions akin to slavery. Western corporates together with their Chinese counterparts have continued to disregard the rights of African workers by subjecting them to employment conditions consistent with slavery whilst exploiting African natural resources for nothing. The modernisation theory emphasises that colonialists built infrastructure (using excessively exploited African slave labourers) to “integrate” Africa into the global economy. All such infrastructure was mainly built for the exploitation of Africans and extracting their natural resources for free. As such, African economies were and are still structured to benefit the colonial powers with any surplus being drained from Africa leading to no development at all on the continent. The dependency theory has pointed out that African economies have largely been subordinate to western economies and are subjected to unfair

trading terms and the evident exploitation of African workers. It is not only adult workers who have been exploited by the neo-colonialist empire but child labourers as well. It is in this context that decolonisation discussed with specific emphasis being placed on the need to eradicate unfair labour practices in the African societies. This chapter will explore the significance of the right to fair labour practices in South Africa as a legal mechanism aimed at eradicating colonial and apartheid induced unfair labour practices which still persist in the contemporary South African (and indeed African) society. Constitutionally protected labour rights can only be effectively honoured if the enabling labour legislation giving effect to the constitutional labour provisions is drafted comprehensively and accordingly in line with the purport and spirit of the South African Constitution which seeks amongst other things to eradicate injustices attributed to the legacy of colonialism and/or apartheid (See Explanatory Memorandum on the Labour Relations Bill 1995 Volume 16 ILJ 278. The Memorandum was prepared by the Ministerial Legal Task Team (the Task Team) with the express objective of revealing the underlying thinking behind the proposed innovations which led to the current form of the Labour Relations Act 66 of 1995). Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution (Section 3 of the LRA directs any person applying the Act to interpret its provisions-

- a) To give effect to its primary objects;
- b) In compliance with the Constitution; and
- c) In compliance with the public international law obligations of the Republic).

The proper interpretation of legislation in pursuit of a decolonisation and/or transformation agenda will ensure the protection, promotion and fulfilment of constitutional labour rights *vis-a-vis* the general right to fair labour practices hence the way they are interpreted will raise a constitutional matter. In this way, the courts and the legislature act in partnership to give life to constitutional rights in a postcolonial and decolonising South African society.

This chapter outlines the content of the constitutional right to fair labour practices as given effect to in labour legislation and how it is crucial to realising the decolonisation of the South African labour market. It analyses the approaches used in interpreting the right to fair labour practices in South Africa and the constitutionality of the limited coverage of the right in particular, in section 186(2) of the Labour Relations Act 66 of 1995, and its associated statutes, the Employment Equity Act 55 of 1998 and the Basic Conditions of Employment Act 75 of 1997. The approaches to interpreting and applying the

right to fair labour practices in South Africa will be of great importance in attempting to determine the ambit of this extensively flexible right especially in the context of the decolonisation agenda. This will assist to assert whether current legislation is in conformity with the Constitution or not, in the manner it gives effect to this right and how it addresses issues on decolonising South Africa's labour market. This chapter will begin with an analysis of the approach taken by the Industrial Court in interpreting the concept of fair labour practices and develops by analysing the impact of the current Constitution.

The Approach to Interpreting the Right to Fair Labour Practices and the Decolonisation Agenda

It is undeniable that decades of colonialism and the postcolonial narratives of globalisation underpinned by exploitative and impoverishing neoliberal economic policies prompt a need to engage in discourses aimed at decolonising South Africa's labour market. There is need to formulate labour regulations and interpret them in a manner that leads to the redistribution of social wealth in order to eliminate the unjustifiable inequality which is caused by the implementation of neoliberal economic policies. We therefore advance the arguments on decolonisation and the right to fair labour practices in the pursuit of Franz Fanon's intellectual ideals when he pointed out that, *"Every time a man has contributed to the victory of the dignity of the spirit, every time a man has said no to an attempt to subjugate his fellows, I have felt solidarity"* (Fanon 1967). The approach to interpreting and applying the constitutional right to fair labour practices is of great importance in attempting to give legislative content and establish substantive guidelines to define the right to fair labour practices in a decolonising and/or transforming South African society, as the right to fair labour practices is largely considered as "incapable of precise definition" (*NEHAWU v University of Cape Town & others* 2003 ILJ 95, paragraph 33H-I). Recourse has had to be taken to the definition of unfair labour practices that was in force at the time of the Constitution's enactment to obtain greater understanding into the right to fair labour practices hence reference to the decisions of the Industrial Court dealing with the concept of fairness will be essential to this chapter (Landman 2004: 805). The discussion of the interpretation approaches to the concept of fair labour practices by the Industrial Court and how they impact on the current interpretation approaches under the current Constitution in the pursuit of a decolonisation agenda is done below.

The Industrial Court

The Industrial Court introduced the concept of fair labour practices to South Africa through its unfair labour practices concept. In analysing the Industrial Court's interpretation of the concept of fairness, Marais referred to three different approaches which offer valuable insights in giving content to the term fairness (Marais 1989: 15-39). It is essential at this point to note that though the approaches Marais analyses were pre-constitutional, they are still valuable and of great relevance to the scheme of interpreting the constitutional right to fair labour practices in the new constitutional era and how it is given effect to by labour legislation. As De Waal *et al* (2004: 4) point out, there is no difference between the 1993 and the 1996 Constitutions in terms of the protection of fundamental rights. On the basis of such understanding, we will commence by outlining Marais' analysis of the reasonable employer approach.

The reasonable employer approach

The reasonable employer approach gives rise to the question whether a reasonable employer, in undertaking an action which may be challenged as unfair by an employee, would have reached the same conclusion as the respondent (Brassey 1990: 889). It appears from the commentary of Anderman (1985) that the question is not whether a lesser penalty would have been appropriate or whether a reasonable employer might have considered a lesser penalty appropriate but whether it was within the range of reasonable responses for the employer to dismiss the employee in the circumstances. The test has its origin in English law (Anderman 1985: 153). The English law version of 'unfair labour practices' centres on unfair dismissals only (Brassey, 1990: 78), unlike the unfair labour practices concept of South Africa (*Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 1301 (SCA) paragraphs 10-11), where unfair labour practices in terms of the LRA are not limited to dismissals (Section 186(2) of LRA). However, comparisons with the English law are necessary in order to ascertain the interpretation of the concept of fairness and reasonableness that are useful in the unfair labour practice concept.

The reasonable employer test can provide guidance as to the determination of both procedural and substantive fairness not only with reference to dismissals but also with reference to other forms of employer's conduct that may constitute unfair labour practices such as transfers and unilateral variation of conditions of service. English legislation provides that in determining whether a dismissal is unfair or not recourse is to be had as to whether or not the employer acted reasonably or unreasonably in treating the conduct in question as sufficient to warrant dismissal (In *Toyota South Africa (Pty) Ltd v Radebe & others* 1999 ZALC 42 paragraph 49, Nicholson JA concluded that: "What is clear is that the origins of the 'reasonable employer' test in English law, is a statutory

provision which specifically refers in terms to an employer acting reasonably.” See also Section 94 of the Employment Rights Act of the United Kingdom; This provision states as its foundation the notion that an employee has the right not to be unfairly dismissed by his employer. Any such employer who dismisses his or her employee must then prove that there were reasonable grounds for undertaking such course of action). The test requires an examination of whether the employer had reasonable grounds for believing that the employee committed the alleged misconduct; whether the procedure adopted was reasonable in the circumstances; and whether the penalty imposed by the employer was a reasonable one (Morris 2000: 480).

In an article written in the pre-constitutional era by Cameron (1988: 165), he acknowledged that as a general rule or requirement a worker is entitled to an opportunity to be heard before he can be dismissed. Cameron then acknowledged that there are exceptions to this general rule. He gave these as the so-called crisis zone situations, a waiver or quasi waiver situation (Ibid: 176-178. In this instance, Cameron discussed a waiver and quasi-waiver as some of the exceptions to the requirement for a pre-dismissal hearing. After emphasising that in law a waiver occurs when a person, with full knowledge of a legal right, abandons it, he expressed the view that in the employment context it would be unrealistic to apply the full requisites of the legal doctrine of a waiver before an employee’s conduct could be said to exempt an employer from the hearing requirement. He said all that should be required “is that the employee should indulge in conduct which establishes that the employer can no longer reasonably or fairly be expected to furnish an opportunity for a pre-dismissal hearing.” See also *National Union of Metal Workers of SA & others v Elm Street Plastics t/a Adv Plastics* 1989 10 ILJ 328 (IC) at 338 A - D where it was stated that striking employees had waived or abandoned their right to be heard. In the same case, it was also stated that there was an obligation on the employer to give the strikers a hearing before they could be dismissed. However, it was emphasised that there would be no such obligation in a case where the workers could be said to have “abandoned their entitlement to a pre-dismissal hearing”. It was said that strikers could be said to have abandoned their entitlement to a hearing where the nature of their conduct was such that their employer was justified in regarding it as a repudiation of their contracts of employment or where the strikers’ conduct established that no purpose would be served by holding a hearing or where such a hearing would be “utterly useless”. In that case the industrial court held that by engaging in an illegal strike the employees had repudiated their contracts of employment and were, therefore, not entitled to a hearing. The industrial court also sought to justify its finding that the workers were not entitled to a hearing by stating that by their conduct the strikers had made it plain that a hearing would be pointless and that they had waived their

right to a hearing (at 338A - J) and situations where, although the denial of procedural justice is not condoned, the employee is nevertheless not granted any relief by reason of the employer's failure to ensure procedural fairness as was held in the case of *NUMSA v GM Vincent Metal Sections (Pty) Ltd* 1999 4 SA 304 (SCA) at 318A-D (See also the earlier case of *NUMSA v GM Vincent Metal Sections (Pty) Ltd* 1993 14 ILJ 1318 (IC) at 1320J-1321A. See further *Plascon Ink & Packaging Coating (Pty) Ltd v Ngcobo & others* 1997 18 ILJ 327 (LAC) at 339I - 340G. In this case, the utterly pointless or useless approach was relied on. It is one where it is said that, an employer is not obliged to afford workers the benefit of being heard where a hearing would have been utterly useless. See also *National Union of Metalworkers of SA v Vetsak Co-operative Limited and others* 1996 17 ILJ 455 (A) at 455C-D and 468E-G). There are also judgements which seem to suggest that an employer who contemplates the dismissal of strikers is relieved of his obligation to afford the strikers a hearing if he issues a fair ultimatum (*NUMSA v Haggie Rand Ltd* 1991 12 ILJ 1022 (LAC) at 1028 F- 1029; *FAWU & others v Mnandi Meat Products & Wholesalers CC* 1995 16 ILJ 151 (IC) at 161 F-H; *Plascon Ink & Packaging Coating (Pty) Ltd v Ngcobo & others* 1997 18 ILJ 327 (LAC) at 338F-339D. Reasons advanced in respect of an ultimatum included instances where: "(a) "Management had acted fairly"; (b) it "could not reasonably have been expected" of the management to "hold a hearing or inquiry"; (c) to require the employer to give the strikers a hearing after the issuing of an ultimatum but before dismissal would emasculate the ultimatum because the ultimatum would have to read that the strikers were required to return to work or be dismissed but subject to a disciplinary hearing; this requirement would amount to demanding the employer to sheathe the sword and render it ineffective in circumstances where the workers are engaging in a power struggle - and that would not be fair. (d) it is artificial to require an employer who is directly affected by flagrant, unmistakable misbehaviour of an employee to conduct an enquiry into such misbehaviour after such employer has himself deemed it necessary to issue a dismissal ultimatum as a result thereof). Article 7 of ILO Convention on Termination of Employment No 158 of 1982 provides as follows: "The employment of a worker will not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."

It is clear from the provisions of article 7, that international standards are such that the only basis on which an employer can escape the obligation to give a hearing where the reason for dismissal is based on the employee's conduct or performance is if he cannot reasonably be expected to give such a hearing in a particular case (*NUMSA v GM Vincent* 1999 4 SA 304 (SCA) at 318 A). There

is no provision for another exception in the form of a dismissal for participation in a strike.

The Industrial Court in the case of *Lefu v Western Areas Gold Mining Company* 1985 ILJ 307 (IC) (In *Modise & Others v Steve's Spar Blackheath* 2000 ZALAC I paragraph 40, the case of *Lefu* was given as an example of a case in which courts refused to find dismissals of strikers unfair or unlawful by reason of employers not observing the *audi ateram patern* (*audi*) rule when contemplating such dismissals, even when employers had failed to give strikers a hearing or to observe the *audi* rule) followed the reasonable employer approach. In this case, the employer dismissed employees for either inciting or partaking in a riot in its mine. The resultant effect of the riot was the death of nine people and the employer suffered financial losses. The employer, due to the crisis zone situation at hand and as referred to above, did not hold a disciplinary enquiry since the process would have taken at least five days during which period the employer would have had to house those it believed guilty of the offences in its hostels. Furthermore it felt that immediate dismissal would help alleviate the highly emotional state of affairs that existed at the workplace. The dismissed employees alleged that they were innocent and that they had not committed the alleged offences. The court held that the employer had not committed an unfair labour practice. In reaching its conclusion it relied on English Law and referred with approval to the case of *Ferodo v Barnes* 1976 IRLR 302 (In this case, it was held that the courts should not enquire as to whether or not the employer at the time of dismissal had reasonable belief that the employees had in fact committed the offence but rather as to whether or not the employer at the time of dismissal had reasonable grounds to believe that the employees had in fact committed the offence). The approach taken in the *Lefu* was followed in *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1986 7 ILJ 739 (IC) at 743E-F (In this case, Bulbia AM stated, "An employer need not be satisfied beyond reasonable doubt that an employee has committed an alleged offence. The test to be applied is whether the employer has reasonable grounds for believing that the employee has committed the offence") as well as the case of *Yichibo Plastics (Ltd) v Muller* 1994 ILJ 593 (LAC) at 4 (In this case the Labour Appeal Court stated that in applying the reasonable employer test, "what is of relevance is what the employer did and not what the employer might have done in other circumstances"). In 1989 in *Food and Allied Workers Union and Others v CG Smith Sugar Ltd Noodsberg* 1989 10 ILJ 907 (IC) (The court held that in determining whether the alleged conduct constitutes an unfair labour practice the court was limited to evidence to the employer at the time of the employer's decision and could not take evidence that subsequently became available into account) the court referred to the *Lefu* case with approval.

In 1990 in *Govender v Sasko (Pty) Ltd t/a Richards bay Bakery* 1990 11 ILJ 1282 (IC) (See also *Engen Petroleum Limited v Commissioner for Conciliation Mediation and Arbitration and others* 2007 ZALAC 5 paragraph 18 in which the *Govender* case was referred to in view of the 1988 amendments to the LRA) it was held that the approach adopted in the *CG Smith Sugar* case was no longer applicable because of the 1988 amendments to the definition of an unfair labour practice. In terms of the 1988 definition an unfair labour practice included: “...the dismissal by reason of any disciplinary action against one or more employees without a valid and fair reason.”

The court held that this provision rendered it necessary for the court to establish the fairness and validity of the employer’s reason for dismissal. In *Hoechst (Pty) Ltd v CWTU and another* 1993 1 ILJ 1449 (LAC) at 1459B-I (In this case, it was held that the courts should concern themselves with the fairness of the act or omission. In this case the employee, accused of unlawful possession of property belonging to a co- employee, gave evidence in court, which he had withheld at the disciplinary enquiry. See also *Malan v Bulbring NO and Others* 2004 ZALC 52 paragraphs 23-24) the Labour Appeal Court held that the Industrial Court should embark on a complete re-appraisal of the reasonable employer approach and that it could take into account new evidence that was not available to the employer at the time of the dismissal in its determination of the fairness or otherwise of the employer’s conduct (The decision taken in *Hoechst* is substantiated in the case of *Khula Enterprise Finance Ltd v Madinane and Others* 2004 ZALC 10 paragraphs 22-25). *In casu* this evidence served to exonerate the employee from the alleged misconduct. The issue in discussion in the case of *Hoechst* was the proposition that the provisions of a disciplinary code must not be applied mechanically but an arbitrator or court must decide the matter ultimately, on whether having regard to all the circumstances, the procedure as followed to come to a decision in a disciplinary proceeding was fair (See also *Highbeld District Council v CCMA & Others* (2003) 24 ILJ 517 (LAC) paragraph 15 and *Leonard Dingler (Pty) Ltd v Ngwenya* (1999) 20 ILJ 1711 (LAC). In *Leonard Dingler* Kroon JA stated that: “In my judgement, and having regard to all circumstances, the time when and the manner in which the apparent hearing was held, while not strictly in accordance with the appellants disciplinary code, were substantially fair, reasonable and equitable”). Unlike the approach taken by the Industrial Court which only required that the employer shows that it was reasonable in its conclusion of effecting a dismissal and that it had reasonable grounds for the belief that the employee was guilty of the alleged misconduct, it now had to be determined also whether the procedure as implemented by the employer to reach a particular decision was ultimately fair.

The onus of justifying the reasonable employer test did not end there. The LRA makes it clear that procedural fairness requires a determination whether,

“the dismissal was effected in accordance with a fair procedure” (Section 188(1)(b)). In that sense, the reasonable employer test now required that even in the presence of a disciplinary code, and the employer acted in accordance with such code, mere compliance with the code would not be exhaustive of the enquiry into an employee’s conduct. In analysing the effects of the *Hoechst* case, the court in *Khula Enterprise Finance Ltd v Madinane and Others* 2004 4 BLLR 366 (LC) paragraph 10 (See also *Dell v Seton (Pty) Ltd & others* 2009 2 BLLR 122 (LC) paragraphs 27-29) held that the code merely represents guidelines and is not to be elevated to an immutable code which is to be applied rigidly and must apply regardless of the circumstances. In other words it was not sufficient for a reasonable employer to effect the dismissal of an employee merely on the basis of complying with a disciplinary code. Francis JA whilst determining a gross irregularity which justified the review and setting aside of an award taken by an arbitrator in the case of *South Africa Revenue Service v CCMA & Others* (2001) 22 ILJ 1680 (LC) paragraphs 32 and 33 remarked that: “It is crucial that an arbitrator who is conducting arbitration proceedings knows what the true issues are that he is called upon to determine. Where he issues an award which is based on a failure by him to appreciate the true nature of the issue before him, he commits a gross irregularity which vitiates the entire proceedings.”

Francis JA’s remark extends to the requirements to be met by a reasonable employer in taking a decision to dismiss or not to dismiss an employee. With the code serving merely as a guideline, the employer was entitled to look outside the organisation for somebody with appropriate expertise and objectivity to chair an enquiry rather than the employer chairing the enquiry. This served the interests of both sides receiving a fair hearing instead of the approach used by the Industrial Court in which the employer presided over disciplinary enquiries.

The same approach was followed in the case of *Highveld District Council v CCMA and others* (2002) 12 BLLR 1158 (LAC) (See also *Dell v Seton (Pty) Ltd & others* 2009 2 BLLR 122 (LC) paragraphs 26-29), where the Labour Appeal Court held:

Where the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will go a long way towards proving that the procedure is fair as contemplated in Section 188 (1)(b) of the Act. The mere fact that a procedure is an agreed one does not however make it fair. By the same token, the fact that an agreed procedure is not followed does not in itself mean that the procedure actually followed was unfair.... When deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinise the procedure actually followed. It must decide whether in all the circumstances the procedure was fair.

The position taken in the above cases reflects the legislative intention of the LRA, heralded at its inception as a single document which would give employees and employers clear insight into their respective rights and obligations (One of the express aims of the Labour Relations Bill; Draft Negotiating Document in the Form of a Labour Relations Bill, GN 97 GG 16259, 10 February 1995 281, was to address the “lack of an overall and integrated legislative framework for regulating labour relations”, which arose as a result of a multiplicity of laws governing different sectors, especially the private sector and the public sector). The Labour Court, using the LRA as the tool to fair labour practices has been vested with the responsibility of implementing fair labour practices (See section 157 of the 1995 LRA). In trying to achieve this obligation, the Labour Court has adopted a similar approach to the unfair labour practice approach adopted in the Industrial Court (*Yichibo Plastics (Pty) Ltd v Muller case*, 595F-H). In order to establish such fairness and validity the decision taken by the court should give consideration to all available evidence including evidence that was not available to the employer at the time the employer took its decision. This approach was followed in *FAWU v South African Breweries Ltd* 2002 ZALC 102 paragraph 40 (In this case it was stated that, “If the employer erred reasonably, there will be no unfair labour practice), which rendered the definition of a reasonable employer virtually the same as in the *Lefu* and *CG Smith Sugar* cases. In other words it was no longer required that the courts determine a valid and fair reason for dismissal.

The reasonable employer test focused on the actions of the employer and not on the effect of such sanctions (The Constitutional Court affirmed this position in the case of *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 2 SA 24 (CC) paragraph 72). The most obvious criticism that can be levied against the approach is that there may be circumstances where an employer’s conduct can be found to be reasonable, but the effect thereof might be unfair on the employee. This can happen if the employer’s reasonable decision is based on incorrect or inaccurate facts or misinterpretation of facts (Ibid, paragraphs 108-111). If the employer erred reasonably, there will be no unfair labour practice (Since the English concept of “unfair labour practice” informed the application of the same concept to dismissal in South Africa, recourse to Section 98(4) and (6) of the Employment Rights Act 1996 may give guidance as to the application of reasonability to dismissals in South Africa). This is unfair on the basis that in determining whether or not the effects of an act or omission are objectively unfair it is necessary to have recourse to evidence beyond the factual circumstances which prevailed at the time of dismissal (Van Niekerk 1994: 71). Since the court has to establish the effect on the employee in the application of the reasonable employer test, it is necessary for the court to establish whether or not the alleged misconduct was committed by the employee or not, not

whether the employer was justified in its beliefs. As such the court should have recourse to all evidence, including evidence that was not made available to the employer. The employer can also lead evidence to demonstrate that the effects on the employee are not unfair (Halsbury's Laws paragraph 483).

However, there are some changes to the approach to the application of the reasonable employer approach in the new constitutional era. Cheadle (2002: 38) whilst expressing his views on whether strikers are entitled to be heard before they can be dismissed pointed out that:

A good case can be made out that an employer should give employees or their trade union an opportunity to address the employer on sanction before dismissal. This can be effected by giving the trade union an opportunity to make representations on sanction or including in the ultimatum itself an invitation to employees to make such representations. This should be supplemented by an invitation to individual employees to approach the employer after dismissal if the reason for not working is not participation in the strike. This does not impose too heavy a burden on the employer - it is common labour relations practice and it goes a long way to ensure that the employees are fairly treated. There is also the argument that the Code of Good Conduct: Dismissal imposes a more stringent requirement than the general application of the rule developed by the courts under the old LRA. It is only in 'exceptional circumstances' that the employer may dispense with pre-dismissal procedures (paragraph 4(4) of Schedule 8). Accordingly, the employer may have to go further than was expected of it under the old LRA.

The basis of the above analysis is that one of the grounds that section 188(1) of the LRA provides as rendering unfair a dismissal that is not automatically unfair is the effecting of a dismissal which is not in accordance with a fair procedure (Section 188(1) in respect of other unfair dismissals provides that: (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove (a) that the reason for dismissal is a fair reason- (i) related to the employee's conduct or capacity; or (ii) based on the employer's operational requirements; and (b) that the dismissal was effected in accordance with a fair procedure). Section 188(2) enjoins that provisions of a Code of Good Practice be taken into account when the fairness of a dismissal is considered. Item 6 of the Code of Good Practice: Dismissal deals with the dismissal of employees participating in an unprotected strike. Item 6(2) thereof provides as follows:

Prior to dismissal, an employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should

state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.

It is clear from item 6(2) of the Code that there are at least two steps that an employer, who is faced with an unprotected strike, is now required to follow before effecting a dismissal of striking employees (The provision provides that; “Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them”). Firstly the employer must, at the earliest opportunity, contact the union to discuss the course of action he intends taking. Secondly the employer should issue an ultimatum. The discussion envisaged by item 6(2) between the employer and the union constitutes an opportunity which the employer is required to give the strikers through their union to state their case before the employer can decide whether to pursue the course of action it intends to take referred to in item 6(2). In the case of *Modise and others v Steve’s Spar Blackbeath* 2000 ZALAC 1 paragraph 80 (See also Grogan, 1999) Zondo AJP concluded that:

The discussion contemplated by item 6(2) is not, and could not have been, intended to be, a one-way traffic where the employer simply instructs or tells the union what to do. It was intended to be an opportunity for the union to hear what the employer has to say about the strike and what he intends doing about it so that the union has an opportunity to say whatever it may have to say about the strike and, more importantly, about the course of action which the employer tells them he intends taking. It is an opportunity for the union to persuade the employer not to dismiss or not to issue an ultimatum which would result in the dismissal of the strikers in the event of non-compliance therewith and/or depending on the circumstances, to persuade the strikers to resume work even before an ultimatum can be issued.

The employer is now obliged to consider the union’s representations properly and in a *bona fide* manner before it can decide to pursue its intended course of action, whatever it may be, including dismissal without an ultimatum

or the issuing of an ultimatum which will result in the dismissal of those strikers who fail to comply therewith (*Modise* case, paragraph 36). That does not mean that the employer should necessarily agree with the union's representations or views (*Ibid*, paragraph 81). The employer would not be entitled to ignore such representations and to simply go through the motions pretending to be considering them when in fact he is not (Sec 188(2) of the LRA enjoins that provisions of a Code of Good Practice be taken into account when the fairness of a dismissal is considered. Item 6 of the Code of Good Practice: Dismissal deals with the dismissal of employees participating in an unprotected strike. Item 6(2) thereof provides as follows: "Prior to dismissal, an employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them"). This approach therefore may be of relevance to the application of section 23 of the constitution to the extent to which a balance is maintained between the decision of the employer and the rights of the employee to be heard and the application of procedural and substantive fairness as provided in the 1995 LRA. Apart from the reasonable employer test, Marais also analyses the economic rationale approach.

Economic rationale approach

The second approach Marais analyses is the economic rationale approach (Marais 1989: 36). The economic rationale approach has as its basis the argument that the purpose of the employment relationship for both the employer and employee is financial gain (Van Niekerk 1994: 65). Brassey explains:

A rational employer dismisses an errant employee so as to get a better employee in his place. He aims at improving the quality of his workforce. If there are no better employees available, dismissal is senseless, the employee would not sooner be dismissed than he would have to be recruited again, because he would be the most suitable applicant for the job. Dismissal, therefore, looks to the future of a better workforce. It does not look to the past. It is remedial, not punitive-punishment in our society being the prerogative only of the parent, the schoolmaster and the bench (Brassey et al, 1990: 70).

In the same manner as in the above, where an employee's work is not up to standard, a dismissal will be justified on the basis of an economic rationale. Disciplinary action short of dismissal can likewise be justified on the basis of economic rationale. Dismissals based on operational requirements (retrenchments) likewise, will be unfair where there is no commercial rationale. In essence, where the conduct complained of is not accompanied by a commercial or economic rationale it will most likely be unfair. The courts have confirmed this when deciding whether or not discrimination is unfair (*Kadiaka v Amalgamated Beverage Industries* 1999 ILJ (LC) 3801 paragraph 40 and *Woolworths (Pty) Ltd v Whitehead* 2000 ILJ 571 (LAC) paragraphs 131-134). One of the criticisms levelled against this approach is that a commercial rationale is not necessarily fair (Marais 1989: 36). It is also difficult to confine or limit the boundaries of what exactly is meant by "economic or commercial rationale". It is necessary to emphasise the procedural fairness in implementing decisions that have an economic rationale especially where the employee is not at fault, for example where there is no misconduct. The approach of the Industrial Court informed the approach adopted in by the Labour Court. Marais also analyses a third approach called the interpretation. This is a very essential concept to this study. The discussion follows below.

Interpretation of statutes approach

The third approach Marais analyses is called the interpretation of statutes approach (Ibid: 23). This approach uses the general definition of an unfair labour practice as its starting point (Ibid, 15). In principle, commission reports (Bhoola, 2002). It is outlined that labour legislation is supported by codes of practice which may be statutory codes of practice drawn up by the National Economic Development and Labour Council (NEDLAC) which include the Code of Good Practice: Dismissals in Schedule 8 of LRA or non-statutory codes of practice issued by the South African Commission for Conciliation, Mediation & Arbitration. These codes of good practice, although often merely providing the guidelines and accordingly not always being of direct legal effect, are taken into account by the Labour Courts in deciding whether or not an employer has breached statutory employment regulations. The reports do not give a specific definition of fairness but give guidance to how fairness may be defined in a specific context and for a specific purpose, for example in cases of dismissals, available at

<http://www.ilo.org/public/english/dialogue/ifpdial/info/national/sa.htm>.

(accessed 20 July 2018)), dictionaries (Dictionary definitions of unfair labour practices are important as they help to tell what is fair from what is seen as unfair in South Africa labour legislation. This is attributed to the fact that the Constitution has not developed meta-scheme of what the right to fair labour

practices entails. The New Oxford English Dictionary defines the fairness as “treating people equally without favouritism or discrimination.” It further provides that fairness also implies an act which is, “just or appropriate in the circumstances.” It also defines ‘unfairness’ as an act that is, “not based on or behaving according to the principles of equality and justice.” In that respect, the Farlex English Dictionary defines an unfair labour practice as, “any conduct prohibited by laws regulating relations between employers, employees and labour organisations.” The Business Dictionary defines unfair labour practices as; “a legally prohibited action by an employer or trade union such as refusal to bargain in good faith”), international law (ILO Conventions and Recommendations though without offering a precise definition of fair labour practices, cover a range of labour matters, including conditions of work (hours of work, minimum wages, night work, weekly rest intervals, paid leave, part-time work, occupational health and safety), social security, employment of women and children) and foreign law (See sections 7 and 8 of the National Labour Relations act of the United States of America. The sections give real guidance into what is unfair in the collective labour practices of the US. The provisions apply to all trade unions and employers. Section 94 of the Employment Rights Act of the United Kingdom helps to assert whether the dismissal of an employee by the employer was reasonable) are used to interpret the meaning of unfair labour practice. In the process the term is fragmented and each word is interpreted in turn. In the end words are put back together to give them meaning. This approach requires that the definition of unfair fair labour practices should be read in context, and that the legislature’s intention and the LRA as a whole should be considered (Marais 1989: 23). This is termed the interpretation approach.

The interpretation approach has become much more vital in labour statutes passed under the current constitutional era particularly with the inclusion within the body of the legislation of a purpose and objects clauses and an interpretation clause that provides express directions on interpretation (Du Toit 2003: 59). It can be applied through two methods. The first method is called the ‘literalist-cum-intentionalist’ approach (Devenish 1992: 28. This approach is referred to as the orthodox ‘literalist-cum- intentionalist’ model of statutory interpretation. This approach continues to enjoy judicial favour. It decrees that the words of a statute are to be given their ordinary, grammatical meaning, unless this would lead to a patently absurd or unjust result, in which certain contextual aids (such as the preamble of a piece of legislation, long title, headings, definition clauses, marginal notes, schedules, parliamentary debates on the legislation, reports of commissions of enquiry and the mischief that an Act or legislative provision was intended to remedy) may be invoked). However, as Devenish contends, this approach has been criticised for its failure to take into account the ‘legal-

political' activity involved in the process of statutory interpretation (Ibid: 32). In principle the argument is that the approach is not sensitive to the context of enacting legislative provisions (Du Plessis & Corder 1994: 60, 66. The authors argued that: "There is, as a matter of fact no such thing as clear and unambiguous language in the abstract (or even in context prior to its meaning having been established). The language of a statute can in other words only be said to be clear once its meaning, interwoven with its full intra and extra textual structure, has somehow been determined. This means that anyone asserting that the meaning of a statute is obvious because its language is clear, is either so familiar with the context that she/he takes it for granted or has previously interpreted the statute intuitively or subconsciously and has in neither instance taken precautions to limit her or his personal predilections and prejudices"). It however remains relevant as it is still favoured by the courts (Devenish 1992: 28). The second approach called the purposive approach (Du Plessis & Corder 1994: 60, 85), has according to Du Toit *et al* (Du Toit 2003: 60) been regarded as being more contextually sensitive and value coherent to statutory interpretation (Devenish 1992: 36. The author stated that: "A purposive methodology looks beyond the manifested intention. The purposive theory has its ratio in the fact that a statute is a legislative communication between the legislature and the public that is inherently purposive. The interpreter must endeavour to infer the design or purpose which lies behind the legislation. In order to do this the interpreter should make use of an unqualified contextual approach, which allows an unconditional examination of all internal and external sources"). This approach like the first one is vital to the interpretation of statutes in the new constitutional era. This is attributed as earlier stated in this chapter, to the drafting of legislation that has set objects and purposes. This conceptualisation is a correct analysis of the approach which in my view if applied in the context of the LRA, EEA and BCEA would imply that before giving effect to a constitutionally protected labour right; the parties interpreting these pieces of legislation must understand the holistic intent and purpose of each Act (See the decision of Joubert JA in *Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800(A)* at 804B-C, where he stated as follows: "The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction, the words of a statute must be given their ordinary, literal and grammatical meaning. If by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to the words' ordinary meaning, unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction. This is the case in instances where interpretation leads to a

manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent”).

On the other hand, the same interpretations may be of value in interpreting a constitutional provision. This is essential in a new constitutional dispensation where the Constitution is the supreme law to which all legislation must comply. There is however a difference in the manner in which a Constitution unlike legislation is interpreted. This is an essential element to interpretation as it defines whether in interpreting legislation, it is regarded to be in compliance with or contrary to the constitutional objectives. A clear exposition of this argument is outlined in an old Canadian case of *Hunter v Southam Inc* 1984 11 DLR (4th) 641 (SCC) at 649 (See also Du Toit 2003: 61; Du Plessis & Corder 1994: 63) in which the Canadian Supreme Court stated:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

Du Toit *et al* (2000: 61) make a crucial analysis which is relevant to the interpretation of statutes under the current constitutional era. We support their contention that a labour statute, in view of the remarks in the Canadian case, like a Constitution should be drafted with an eye to the future. They further contend that a labour statute must be capable of growth and development in order to meet changing circumstances. This is an important point to note particularly when one considers the language used in the current LRA such as reasonable (Sections 14(5), 66(2)(c) and 69(3)), fair (Sections 186(2), 187(1)(f), and 188(1)), sufficiently representative (Sections 11, 29(4)(c) and 32(5)(a)) and just and equitable (Section 68(1)(b)), which is wide and non-specific to allow parties interpreting it to give full effect to the objects and purposes of the legislation in line with the constitutional intent. The BCEA uses the term favourable (Section 4) whilst the EEA uses terms such as equitable (Section 2(a) and (b)), and fair and justifiable (Section 7(1)(b)). The argument here is not that the labour legislation carries the same force as the Constitution but that where legislation has been drafted in a manner that gives full effect to the Constitution; all parties interpreting it must apply it as such. Inversely, where such legislation is incongruent with the objects of the Constitution to the extent of limiting the

purpose and objects set to be achieved by such legislation and a right or rights protected in the Bill of rights, such legislation must be deemed unconstitutional for failing to comply with requirements of the Constitution. The simple reason for this is that legislation cannot be given a wide reading beyond the legislature's intent for drafting it as this may amount to the vesting the powers to legislate to the interpreters of such legislation (*Schoeman* case, at 1103A. In this case it was held that section 186(2) contained a closed list of unfair labour practices and could not be read beyond the given intention of the legislature). In the same manner, where there is a disparity between the legislative content and intended Constitutional meaning of a right, there may be need for an amendment to give full effect to the Constitution or if the disparity is sufficiently wide, there may be a finding that the legislation is unconstitutional.

The interpretation of statutes approach is thus crucial in determining whether the current labour legislation is in conformity with the Constitution in giving full effect to the general right to fair labour practices protected in section 23(1) of the Constitution (Du Toit *et al* 2000: 59). This approach leads to the important question of whether the current labour legislation as already discussed in chapter two of this study is inconsistent with the constitutional right to fair labour practices for excluding all forms of non-statutory fair labour practises. As earlier discussed in chapter two of this study, the LRA in section 186(2) provides for unfair labour practices, a legislative practice which does not extend fair labour practices protection to employers. This raises the question of whether the LRA is unconstitutional for failing to give full effect to the constitutional right to fair labour practices. In principle, does such a legal position promote the decolonisation agenda in South Africa? It is imperative that this question be addressed because black workers (or their ancestors) who have been subject to abuse in the work places in South Africa built South Africa with their own hands in the colonial past yet they have nothing to show for it. These black workers have been oppressed in the colonial past and continue to be oppressed in the post-colonial (supposedly independent) era. Black workers are subjected to racism, sexism and exploitation. However, without their valuable labour, South Africa could not be what it is today.

The EEA therefore follows the LRA as its unfair discrimination provisions were drafted in line with the repealed schedule 7 of the 1995 LRA. The BCEA follows on by failing to give adequate protection to a non-standard worker a development which raises questions of whether this limits the worker's right to enjoy the protection of the constitutional right to fair labour practices as offered by legislation or directly by the constitutional right to fair labour practices. Neither the LRA nor the BCEA gives effect to the constitutional right to fair labour practices in context of collective bargaining (*SANDU v Minister of Defence* case, paragraph 41. Conradie JA, after a consideration of both the provisions of

the Constitution and international labour law, concluded that: “The Constitution, while recognising and protecting the central role of collective bargaining in our labour dispensation, does not impose on employers or employees a judicially enforceable duty to bargain. It does not contemplate that, where the right to strike is removed or restricted, but is replaced by another adequate mechanism, a duty to bargain arises.” The Constitutional Court then provided that an party seeking to rely on section 23(1) of the Constitution for protection must first argue the unconstitutionality of the legislation giving effect to the right). It is now appropriate to analyse whether legislation is complying with the constitutional requirements of fair labour practices and the decolonisation agenda or not. The discussion follows below.

Legislation’s Compliance with the Constitutional Right to Fair Labour Practices

The LRA (Section 1 of the 1995 LRA), BCEA (The BCEA as it aim seeks to give effect to the right to fair labour practices referred to in section 23 (1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation; and to provide for matters connected therewith) and EEA (See Section 2 of the Constitution) were enacted to give effect to and regulate the fundamental right to fair labour practices conferred by section 23(1) of the Constitution of South Africa (Section 23 of the final Constitution of South Africa provides that; (1) Every person will have the right to fair labour practices. (2) Workers will have the right to form and join trade unions, and employers will have the right to form and join employers’ organisations. (3) Workers and employers will have the right to organise and bargain collectively. (4) Workers will have the right to strike for the purpose of collective bargaining. (5) Employers’ recourse to the lock-out for the purpose of collective bargaining will not be impaired, subject to Section 33 (1)). In doing so, the LRA, BCEA and EEA give content to section 23(1) of the Constitution and must therefore be construed and applied consistently with that purpose. The LRA (Section 3(b)), EEA (Section 3(a)), and the BCEA (Section 2(a)) must be applied in compliance with the Constitution. As already established in respect to the meaning of the constitutional right to fair labour practices, the right applies to all parties of the employment relationship (*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) 1309, paragraph 67. The Constitutional Court stated that both employers and employees are to be protected by the Constitution). Section 3(b) of the LRA underscores this by requiring that the provisions of the LRA must be interpreted

“in compliance with the Constitution”. Therefore the proper interpretation and application of the LRA will raise a constitutional issue because the legislature is under an obligation to “respect, protect, promote and fulfil the rights in the Bill of Rights” (Section 39(2) of the South African Constitution of 1996; Section 39 enjoins the Court, when interpreting the bill of rights and any legislation and when developing the common law or customary law, to promote the values that underlie an open democratic society based on human dignity, equality and freedom, to consider international and foreign law and promote the spirit, purport and object of the Bill of Rights, respectively. Furthermore, two key constitutional values are involved in all labour matters, the right to equality including the right not to be unfairly discriminated against, and the right to fair labour practices. It is therefore imperative to consider how the rights are interpreted and applied by the enabling legislation when tested against the values of the new 1996 Constitution. See also section 7(2) of the Constitution which provides that, “The state must respect, protect, promote and fulfil the rights in the Bill of Rights”).

In the cases of *Simelela & others v MEC for Education, Province of the Eastern Cape & another* 2001 22 ILJ 1688 (LC) and *NEWU the Labour Court* admitted that the definition of unfair labour practice in section 186(2) of the 1995 LRA is not exhaustive. This position is in stark contrast to the position held by the 1956 LRA, which regarded unilateral variations to terms and conditions of a contract of employment, the denial of pension rights, transfer of employees and refusal to bargain or bargaining in bad faith as unfair labour practices. Under the 1956 LRA dispensation, both employers and employees could raise an unfair labour practice. The Labour Court has accepted that conduct by an employee could conceivably constitute an unfair labour practice. However, the Labour Court has held that the existence of possible residual unfair labour practices derived from the Constitution and not catered for by the LRA does not mean that employees can utilise constitutional review to obtain benefits such as a grading or higher salary which are obtainable from collective bargaining (*Moloka v Greater Johannesburg Metropolitan Council* 2005 26 ILJ 1978 (LC)). In the case of *Benjamin v University of Cape Town* 2003 12 BLLR 1209 (LC) the Labour Court refused to accept that the applicant was a victim of unfair labour practice in the terms of section 23(1) of the Constitution merely because he was more experienced, qualified and suitable than the successful candidate for a post which he had applied.

The judgements clearly indicate that while the court accepts that some unfair labour practices may infringe the Constitution but not necessarily the labour Acts, judges will not accept the argument that labour legislation is unconstitutional because it is not comprehensive (Grogan, 1999: 86. Also, in order to preserve laws which are *prima facie* unconstitutional, Du Plessis &

Corder 1994: 70 argue that all laws which *prima facie* violate the provisions of the constitution, but which are reasonably capable of a more restrictive interpretation should be construed accordingly. Du Toit *et al*, 2000: 66 argue that the aim should be to preserve as far as possible the validity of laws which *prima facie* violate the Constitution). The court will also not interpret the provisions of statutes more widely than their terms permit merely to bring certain actions within their reach (Ibid). However in the case of *Simelela* the Labour Court consented that although the unlawful transfer of an employee did not fall within the terms of the statutory definition of unfair labour practice, it could nevertheless be challenged under section 23(1) of the Constitution. This issue leads to an important role that the Constitutional Court must play in the field of labour rights interpretation. The Court has made it clear that its role in this regard goes beyond interpreting the provisions of the Constitution, including the fundamental rights provision and determining whether a particular statutory provision constitutes a constitutional infringement. In the case of *NEHAWU* the Constitutional Court found that the proper interpretation by the Labour Appeal Court of a statutory provision, section 197 of the LRA, was in itself a constitutional matter, within the context of the constitutional right to fair labour practices, to be entertained finally by the Constitutional Court (*NEHAWU v University of Cape Town* case, paragraph 14).

The Constitutional Court has also sought to establish the constitutional causes of action irrespective of the existence of other causes of action (*Chirwa v Transnet* 2008 2 BLLR 97 (CC) paragraphs 47 & 50). This was necessitated by the problem that had emerged in the area of public employment of the litigants seeking to rely on the Constitution when there was legislation that could provide remedies for their disputes (Ibid). Questions had been raised as to whether a litigant is confined to the available labour law causes of action and remedies if a constitutional case can be made out too. It has been held in some cases that if the cause of action is primarily a labour law issue, the fact that the action of the employer may violate the fundamental rights, does not change the basic nature of the dispute (See *NAPTOSA & Others v Minister of Education, Western Cape & Others* 2001 22 ILJ 889 (C) and *Mcosini v Mancotywa*, 1998 19 ILJ 1413 (Tk)). The Constitutional Court adopts a wider approach. However, whilst it is accepted that the Constitution adopts a wider approach, a discussion of cases which allow direct reliance (pre-*SANDU* cases) on the Constitution will be done in order to differentiate them from the current approach (post-*SANDU* cases) which no longer permit direct reliance on the Constitution (In *SANDU v Minister of Defence & another* 2007 9 BCLR 785 (CC), in considering the meaning of ‘worker’ the Constitutional Court stressed the importance of its duty in terms of section 39 of the Constitution to consider international law. The Court in applying the approach of the International Labour Organisation concluded that even though

members of the armed forces did not have an employment relationship with the defence force in the strict sense, they nevertheless qualified as workers for purposes of the Constitution. Cheadle also argues for a less restrictive meaning than that ascribed to 'employee' in Section 213 of "the LRA". The policy consideration put forward in support of this argument is the growth in the number of 'atypical employees' who remain vulnerable to employer exploitation.).

Pre-*SANDU* cases allowed an applicant subjected to unfair labour practices to rely directly on the Constitution for protection. An applicant could rely on a human rights provision in the Constitution to bring a claim, despite the availability of one or more other causes of action. In the *Hoffman v South African Airways* 2001 1 SA 1 (CC) paragraph 18 case the applicant who had been refused the job of a cabin attendant because of his HIV status, approached the High Court and then the Constitutional Court on the basis of the alleged infringement of his constitutional right to equality. The applicant could have used the protection of the LRA, but chose the constitutional rights route. That the Court must have been aware of this, is evident from the fact that although granting the applicant his claim, the Court was sensitive to the specific powers of the Labour Court in terms of the Employment Equity Act to deal with HIV testing in order to determine suitability for employment.

In *Fredricks v MEC for Education and Training, Eastern Cape* 2002 2 BLLR 119 (CC) the Court made it clear that it was prepared to let the applicant choose a cause of action, even though the dispute *in casu* could be resolved on the basis of the power of a particular labour law institution, such as the Commission for Conciliation Mediation and Arbitration, to interpret and apply a collective agreement in terms of section 24 of the LRA (*Fredricks* case, paragraphs 31-35). The Court did not find fault with the applicant's reliance on a constitutional cause of action, namely the alleged violations of the right to equality (See Section 9 of the Constitution) and the right to just administrative action (See Section 33 of the Constitution). However, where the matter is raised in the Labour Court structure, an applicant should not be allowed the right to appeal to the Constitutional Court directly, as the labour courts should not be bypassed in matters falling within their jurisdiction (See the case of *Dudley v City of Cape Town & another* (C 828/2002) 2004 ZALC 1 paragraph 9). However, there is no guarantee that a smart litigant will not present his or her case in such a manner as to determine the nature of the dispute and resultantly the ideal court to determine the matter.

It then is less clear as to the circumstances under which an applicant may rely directly on the Constitution where legislative provisions offer no protection against a practice which may be unfair; for instance, the transfer of an employee to another branch of an employer's business (*Ibid*). There have been conflicting

decisions. In *NAPTOSA & others v Minister of Education, Western Cape & Others* (*Naptosa* case, paragraphs 895A-D) the High Court held that direct reliance on the Constitution should be avoided as this would lead to the development of two streams of jurisprudence. If the LRA were found not to give adequate protection to the constitutional right, it was ruled, the appropriate course would be to amend the LRA to eliminate the shortcoming rather than permitting a court to fashion a remedy (Ibid at 894F-H and 896E-897E. Garbers, C., (2002), “The Battle of the Courts: Forum Shopping in the Aftermath of Wolfaardt and Fredricks,” *Law Development and Development*, vol. 197 109 sums up the position as follows; “Before direct infringement of a constitutional right is relied on, the applicable norm should be sought in the common law or ordinary legislation, and before Constitutional remedies are used to rectify a wrong, the possibly more specific remedies available at common law or in statute be applied”). In *Moloka v Greater Johannesburg Metropolitan Council* paragraphs 12-13, the Labour court declined jurisdiction in a claim for increased remuneration based directly on section 23(1) of the Constitution on the basis that the section could not be relied upon to grant an employee a benefit to which she was not entitled as of right. By contrast, in *Simelela & others v MEC for Education, Province of the Eastern Cape & another* 2001 9 BLLR 1085 (LC) (See also *Hlope & Others v Minister of Safety and Security* 2005 ZALC 103 paragraph 17) the Labour Court had found that, although the transfer of an employee was not catered for expressly within the LRA, an employee was not precluded from relying directly on the Constitution to enforce his or her right not to be subjected to unfair labour practices. However, this position seems to have changed since the judgement passed in *SANDU* (*SANDU*, paragraph 51). *SANDU* prohibits direct reliance on the Constitution without first challenging the constitutionality of the legislation giving effect to a specific labour right.

Post-*SANDU* cases have effectually rendered the direct reliance on the constitutional right to fair labour practices a nullity unless if an aggrieved party first challenges the constitutionality of the legislation giving effect to the constitutional right in question. In the case of *Chirwa v Transnet*, Ms Chirwa was dismissed for an alleged act of misconduct by her employer, Transnet. Following her dismissal, she referred the dispute to the CCMA by alleging an unfair dismissal (See section 191(1) of the LRA). The CCMA was unable to resolve the dispute within 30 days. Accordingly, the CCMA issued a certificate to that effect and recommended arbitration in accordance with section 191 of the LRA. Instead of proceeding to arbitration, Ms Chirwa approached the High Court where she sought an order to set aside the disciplinary proceedings that resulted in her dismissal and reinstate her in her former position. This raised the question of whether it is possible for a litigant to rely directly on section 23(1) of the Constitution or any other basic right in circumstances where a statute

giving effect to that right offers no remedy (See *Booyesen v SAPS and Another* 2008 10 BLLR 928 (LC), paragraph 37). In addressing this issue, the *Chirwa* case gave emphasis on the primary objects of the LRA of 1995. Skweyiya J stated;

The existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is, in the first instance, through the mechanisms established by the LRA that the employee should pursue her or his claims (*Chirwa* case, paragraph 41).

Skweyiya J in the case of *Chirwa* further remarked:

The purpose of labour law as embodied in the LRA is to provide a comprehensive system of dispute resolution mechanisms, forums and remedies that are tailored to deal with all aspects of employment. It was envisaged as a one-stop shop for all labour-related disputes. The LRA provides for matters such as discrimination in the workplace as well as procedural fairness; with the view that even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the disputes (Ibid).

We are fortified in this view by the ratio of this judgment which now gives us latitude to disagree with Landman J's view in *NEWU* to the effect that the LRA is not intended to comprehensively give effect to the constitutional right to fair labour practices, regardless of the existence of other legislation that could potentially give effect to the right in section 23(1). Skweyiya J correctly identifies one key role of the LRA as including the 'comprehensive' offering of 'remedies' for all labour related disputes an approach which is consistent with the decolonisation agenda. Section 186(2) of the LRA and its closed list cannot be regarded as anywhere near comprehensive, considering the broad scheme of labour practices. A discussion of the exclusions in section 186(2) below will justify our argument.

Given this interpretation, there is no room for accepting that section 186(2) of the LRA will still have to retain a narrow construction and closed list in respect of unfair labour practices (The general provision in the Constitution is way broader than the limited construction in section 186(2) for anyone to assume that the provision was drafted to give effect to section 23(1) of the Constitution). We reiterate that the effect of the judgement in *Chirwa* is that the

LRA must give full effect to the right in section 23(1) of the Constitution in all labour practices. In the clear words of Skweyiya J, the LRA “was envisaged as a one-stop shop for all labour-related remedies”. To our minds, the word ‘all’ is inclusive of non-statutory unfair labour practices that we shall discuss below. The Constitutional Court (CC) reinforced the approach taken in *Chirwa* by holding as follows in *SANDU v Minister of Defence and others* (*SANDU* case, paragraph 51):

Where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.

Cheadle AJ in *Booyesen v SAPS and another* 2008 10 BLLR 928 (LC) paragraphs 37 and 38 endorses this view:

The right to fair labour practices is given effect to by the LRA and other labour legislation. Apart from challenges to the constitutionality or interpretation of that legislation or the development of the common law where there is no legislation, the right plays no other role and does not constitute a separate source for a cause of action. That is clear from the recent decision in *SANDU v Minister of Defence & others* 2007 9 BLLR 785 (CC).

Although Cheadle AJ was referring to the synergy between the Constitution and the LRA, his opinion applies equally to the synergy between the Constitution, the LRA and the BCEA (*Booyesen* case, paragraph 15). The reasoning of the court in *Booyesen* appears to suggest that the constitutionality of the LRA must be specifically challenged before section 23(1) of the constitution can be relied on. In other words the LRA must be declared to be in conflict with the Constitution, in the sense of violating a basic right which the Constitution provides. Establishing unconstitutionality requires a detailed analysis of the violated provision in terms of section 36(1) of the Constitution. The case of *Booyesen* concludes that the broad constitutional right to fair labour practices in section 23(1) of the Constitution cannot be relied upon to extend the limits of the statutory definition. It follows then that the constitutional right and the legislation giving effect to it cannot be disaggregated unless of course the legislation or an interpretation of it is being specifically challenged (*Booyesen* case, paragraph 51).

The decisions in *Booyesen*, *SANDU* and *Chirwa* thus pose the question of whether there is a strict correlation between the constitutional right to fair labour practices as provided in section 23(1) of the Constitution and the unfair labour practice provision in section 186(2) of the LRA (Grogan, 2009: 484).

This question has not been addressed by the Constitutional Court (See *S v Mhlungu and Others* 1995 7 BCLR 793 paragraph 59. As a general principle, if it is possible to decide a case without reaching a constitutional issue that is the course that should be followed). The Labour Court however has been called upon in the case of *NEWU* to decide whether section 186(2) of the LRA was unconstitutional. Section 186(2) of the LRA provides for unfair labour practices in terms of the Act. In *NEWU* an employer had referred an unfair labour practice dispute to the CCMA following an employee's resignation without notice. The CCMA argued that it lacked jurisdiction on the basis that the definition of 'unfair labour practice' did not include unfair labour practices committed by employees (Grogan, 1999: 484. "Residual unfair labour practices" were regulated by item 2(1) of part B of Schedule 7 to the LRA as amended. This item read: "For the purpose of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving – (a... (b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee; (c) the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employer; (d) the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement. Item 2 has itself been repealed by the Labour Relations Amendment Act 12 of 2002 but is now regulated by *SECTION 186(2) OF THE 1995 LRA*). The repealed Item 2 of Schedule 7 of the LRA did not embrace the commission of an unfair labour practice by an employee against an employer. The case of *NEWU* nevertheless stated that this does not mean that the item, which has since been repealed, was unconstitutional. In my opinion it means no more than that the LRA of 1995 in section 186(2), in this instance, does not give effect to section 23 of the Constitution. Logically the LRA should be the home of the prohibition on an unfair labour practice committed by an employee). On review, the Labour Court held that the LRA was not intended to regulate the concept of fair labour practices comprehensively though its principal purpose was to give effect to and regulate the fundamental rights conferred by section 27 of the interim Constitution which is now section 23 of the Constitution. As already indicated above, the decision taken *obiter* in *NEWU* cannot be advocated for on the basis of the *ratio* in *Chirwa*. This assertion leads me to an important part of this work, in which we seek to justify our argument to the effect that the LRA has a construction of the constitutional right to fair labour practices too narrow to justify.

We must unequivocally state that, though *NEWU* attempts to address the constitutionality of section 186(2) of the LRA, (something which the Constitutional Court is yet to do), it is trite to argue that Landman J was not correct in justifying the narrow construction of section 186(2) on the basis that

the LRA is not intended to regulate the concept of fair labour practices comprehensively (Though Landman J was dealing with employers' rights, he concluded that: "The LRA is not intended to regulate exhaustively the entire concept of a fair labour practice as contemplated in the Constitution of 1993 nor the present Constitution. The field is far too wide to be contemplated by single statute." Skweyiya's J decision in *Chirwa* seems to nullify Landman J's view and opens the way to argue against the narrow construction of section 186(2) of the LRA. The LRA must be comprehensive in its approach to labour disputes and the constitutional right to fair labour practices). The decision in *NEWU* is contrary to the finding of Constitutional Court in *Chirwa* which requires the LRA to provide a comprehensive system of dispute resolution mechanisms, forums and remedies that are tailored to deal with all aspects of employment and to be as a one-stop shop for all labour-related disputes (*Chirwa* case, paragraph 47). Take note that the Constitutional Court comes to this decision whilst cognisant of the fact that there are other pieces of labour legislation which may give effect to the constitutional right in section 23(1) (Skweyiya J seems not to lose sight of the key objectives of the LRA and is fully cognisant of the importance of so doing (avoiding forum shopping for dispute resolution and remedies for labour disputes) a factor which we applaud). We concur with the Constitutional Court's findings in that the existence of other legislation does not derogate from the primary objectives of the LRA. The LRA must be weighed against its own objectives. This essentially gives room to challenge the constitutionality of section 186(2) of the LRA on the basis of its inadequacies in dealing with fair labour practices as envisaged by the Constitution. An argument of this follows below.

The shortfalls of legislation in giving full effect to the constitutional right to fair labour practices and the decolonisation agenda

This chapter has already made a case to the effect that the courts acknowledge that labour legislation and in particular the LRA do not give full effect to the constitutional right to fair labour practices. Emphasis is put on the LRA because in the case of *Chirwa* (paragraph 47) the Constitutional Court made an attempt to streamline the resolution of all labour matters under the LRA. Furthermore, in *Mohlaka v Minister of Finance and others* (paragraph 10) the Labour Court held that:

Unless the LRA and the BCEA are read consistently and as legislation complementary to each other, the BCEA conflicts with the LRA if it duplicates processes and remedies already provided in the LRA because duplication is precisely what the legislature sought to avoid (*Ibid*).

This implies that the scheme of fair labour practices imported in the LRA must be consistent with that carried in the BCEA (Ibid: paragraph 47). In the case of *Chirwa*, Skweyiya J whilst referring to section 210 of the LRA stated:

If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail (Ibid, paragraph 50).

This in my view implies that if the scheme of the protection of fair labour practices changes in the LRA, all labour legislation as at present must conform to such development. As at present the BCEA follows after the LRA in granting fair labour practices only to employees and not to employers. As a matter of form, the LRA contains the unfair labour practice provision which was supposed to be in the BCEA. The Legislature designed the LRA and the BCEA so that each gives effect to particular labour practices. More specifically, the Legislature carefully demarcated the LRA as the statute regulating collective bargaining, dismissal and unfair labour practices and the BCEA as a statute establishing, enforcing and regulating basic minimum standards of employment, such as leave and hours of work. This study is premised on that basis until an amendment is effected to address the forum shopping that occurs between the two pieces of legislation (*Mohlaka* case, paragraph 18. Here the Labour court stated that: “Initially, the legislative plan was to shift the unfair dismissal chapter from the LRA to the BCEA or other statute dedicated to individual employment law so that the LRA remained exclusively a collective bargaining statute. Although this has not occurred yet, the location of dismissal law in the LRA is merely a matter of form. Substantively, the two statutes regulate discreet issues and prescribe particular processes. However, if dismissal law were located in the BCEA, this would minimise if not eliminate the scope for litigants shopping for a forum between the LRA and BCEA”).

The EEA also developed its unfair discrimination provision in line with the repealed item 2 of schedule 7 of the 1995 LRA. Furthermore, in the case of *NEWU* it was held that the EEA though it seeks to give effect to unfair discriminatory tendencies at the work place, does not use the concept of an unfair labour practice (Refer to the long title of the EEA. The Act emanates from the point of view of trying to promote the constitutional right to equality and democracy as a result of the discriminatory laws and practices as well as the disparities in the employment, occupation and income. Such disparities create pronounced disadvantages such that they cannot be simply addressed by repealing such discriminatory laws). However, the EEA like the LRA infringes

on the employers' rights to equality and equal protection and benefit of these laws and their right to have a dispute about the fairness of the resignation of an employee from service resolved by the application of law in a fair public hearing before the CCMA, Labour Court or another independent and impartial tribunal (This must be construed in light of the fact that section 9 (1) of the Bill of Rights contained in the constitution of South Africa says: "Everyone is equal before the law and has the right to equal protection and benefit of the Law." Section 9 (2) provides that, "Equality includes the full and equal enjoyment of all rights and freedoms. Section 23 (1) of the constitution provides that "everyone has the right to fair labour practices"). Such a legislative construction denotes a narrow construction of the right to fair labour practices in section 186(2) of the LRA.

Proceeding from the above understanding, Du Plessis and Corder contend that, all laws which *prima facie* violate the provisions of the constitution, but which are reasonably capable of a more restrictive interpretation, should be construed accordingly (Du Plessis & Corder, 1994: 70). Du Toit *et al* (Du Toit, 2003: 66) further argue that the aim should be to preserve as far as possible, the validity of laws which *prima facie* violate the Constitution. This argument is contained in section 3(b) of the LRA which requires the LRA to comply with the Constitution. In our view, the reasonableness or unreasonableness of a restrictive interpretation is entirely dependent on the facts and circumstances of the mischief giving rise to the promulgation of the LRA. The enquiry into the reasonableness of the purpose and objects of the LRA has nothing to do with the Court's discretion on how to enforce a constitutionally protected right. It is an analysis of the facts necessitating the promulgation of the LRA in order to determine whether, in all the circumstances of its interpretation, non-compliance with the Constitution is reasonable. The reasonableness of the narrow protection of the constitutional right to fair labour practices in section 186(2) of the LRA must be measured against the legislative intent of promulgating the LRA. The LRA was promulgated with the aim of advancing economic development, social justice, labour peace and democratisation of the workplace (See section 1 of the 1995 LRA). It was also drafted with the legislative objective to giving effect to the concept of fair labour practices as protected in section 23(1) of the Constitution. An analysis of the specific areas of the legislative restrictions in section 186(2) will inform readers as to whether there is an undue limitation of the right to fair labour practices or not.

Specific exclusions from section 186(2) of the LRA

One of the fundamental purposes of the LRA is to give effect to the constitutional right to fair labour practices. Section 186(2) of the LRA currently stands as a provision which gives effect to the constitutional right to fair labour

practices in the LRA. As already argued in this work, the provisions of section 186(2) are too narrow to be construed as giving full effect of the general constitutional right to fair labour practices. There is no justification for arbitrarily limiting employees' rights to fair labour practices to the narrowly circumscribed situations in section 186(2) of the LRA. The argument does not end there, as beyond the concept of unfair labour practices in the LRA, are non-statutory unfair labour practices which the LRA does not regulate (Grogan, 2009: 86). As supreme law, the Constitution protects basic rights. The right to fair labour practices enshrined in section 23(1) of the Constitution stands as one such right. The LRA being legislation based on the Constitution is supposed to concretise and enhance the protection of the right to fair labour practices, by providing for a broader scope of coverage of the right than the current narrow construction of the right in section 186(2). This argument must be viewed in light of the fact that under the 1956 LRA, a number of practices not contained in the current definition of unfair labour practices in the LRA were regarded as unfair labour practices by the Industrial Court (Ibid). Such practices included unilateral variations to terms and conditions of service, the transfer of employees and refusals to bargain or bad faith bargaining (Ibid). A discussion of these omissions will help to inform whether section 186(2) of the LRA is unconstitutional or not. We shall start by analysing the unilateral variation to conditions of service.

Unilateral Variation of Conditions of Service

Unilateral variation of contractual terms was regarded as an unfair labour practice under the 1956 LRA (Ibid: 87). Grogan contends that: "Few practices can be considered more unfair by employees than adverse changes to terms and conditions of employment to which they have not agreed (Ibid)." To that effect, paragraph (d) of the 1988 amendments to the 1956 LRA retained in its list of specific examples of unfair labour practices, "the unilateral amendment of the terms of employment of an employee or employees, except to give effect to any relevant law or wage regulating measure" (The Industrial Court went further to hold that even in certain circumstances a unilateral alteration of an employee's terms and conditions of employment could constitute an unfair labour practice when the alteration was to the advantage of the employees, provided that the change varied the employee's contractual rights. See *Building construction & Allied Workers Union & others v Thorpe Timber Co (Pty) Ltd* 1991 12 ILJ 843 IC and *National Union of Mineworkers v Goldfields of SA Ltd & others* (1989) 10 ILJ 86 (IC)). It may be argued that the inclusion of unilateral variation of conditions of service on the basis that an employer is not permitted to unilaterally amend the terms of a service contract with an employee militates against reference to

common law in the modern day context of labour law. In essence this would amount to a breach of contract of which an employee can remedy such a situation by suing for a breach of contract. However it must be noted that the application of common law is not a post constitutional era phenomena but was also applicable in the pre-constitutional era. In that sense the question arises as to why unilateral variation of terms and conditions of employment are addressed under the current LRA is uncertain (Grogan, 2009: 90). Section 64(4) of the current LRA makes an attempt to provide for unilateral variation of terms and conditions of employment (This essential provision allows employees or trade unions who refer disputes over unilateral amendments to a bargaining council or the CCMA to 'require' the employer not to implement or to reverse the unilateral change for the mandatory period that must elapse before a strike can be called in respect of the dispute. After that the dispute over unilateral change must be determined by industrial action). However, it should be questioned why no proper remedy is offered by the LRA apart from strike action, if at all that is what the legislature intended in this provision, and the reliance on the common law right of enforcement in the High Court (Ibid: 88). This must be viewed in light of the fact that the BCEA allows employees to approach the Labour Court in respect of disputes concerning contracts of employment (Section 77(3)). With the need to avoid a parallel stream of jurisprudence in respect of labour laws, as held in *Chirwa* (paragraph 47), it is questioned why the LRA does not deal with this matter from a principled point of law (The *Chirwa* case strives principally to streamline the resolution of labour disputes under the LRA. The Constitutional Court made a similar effort to streamline Administrative Law in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 7 BCLR 687 (CC) paragraph 22).

There should be no two systems of law regulating labour practices; in this case common law and the Constitution, but only one system of law grounded in the Constitution. This matter is further complicated by the fact that unlike common law, the LRA places no limitation on employers' rights to vary their employees' terms and conditions of employment (Grogan, 2009: 88). The Labour Court in view of section 64(4) cannot restrain an employer from implementing a change, or compel it to restore the status quo for more than 30 days after the employees have referred a dispute, as required in section 64(1) where the variation does not amount to a breach of contract but affects benefits such as loan schemes, special leave privileges or discretionary bonuses (See section 186(1)(b) of the LRA). This is a key issue that has to be addressed by the legislature. It is not clear why unilateral changes to conditions of service were excluded from the current LRA. If the LRA is supposed to provide for resolutions to labour matters, it remains questionable as to why unilateral changes to conditions of service are omitted as an unfair labour practice under

the current unfair labour practice scheme of the LRA? This fuels the argument that there could have been an omission by commission in the drafting of the section 186(2) provision by the legislature. It is submitted that revisiting of the 1956 LRA and the amendments of 1988 may assist in recognising this legislative omission in the area of unfair labour practices. The matter does not end there as transfers are also not specifically dealt with in the current LRA. A discussion of this follows below.

Transfers

Transfers as earlier discussed in chapter 3 of this research are not specifically dealt with in the LRA serve for transfers of employers' business as a going concern (Grogan 2009: 93). The only exception is that of transfers of employers' businesses as a going concern as captured in sections 197, 197A and 197B of the LRA). A unilateral change to terms and conditions of employment in instances where there is no agreement can also be defined as unfair. As Grogan expounds, an employer under common law is not permitted to unilaterally amend terms of a service contract with an employee (Ibid: 87). This would at most amount to a breach of contract, the remedy of which would be an employee suing for damages, terminating the contract or holding the employer to the contract (Ibid). Transfers are also omitted from the legislative scope of protection by the LRA except if such transfer is pursuant to a transfer of an employer's business as a going concern (Ibid: 93). All such issues indicate that the narrow application of the constitutional right in the unfair labour practices provision in the LRA cannot continue to be regarded as a matter that can be dealt with through forum shopping or attempts to rely directly on the constitutional right to fair labour practices (There are other non-statutory unfair labour practices such the protection of pension rights. There is a gap in law concerning pension benefits of employees. See *Meyer v Iscor Pension Fund* 20003 24 ILJ 338 (SCA). See also Grogan 2009: 88).

Since transfers are not dealt with expressly in the LRA it begs the question of what resolution is available in the LRA for employees who have a good reason to refuse offers of transfer where the transfer is necessary for restructuring purposes. Is it appropriate to just treat them as redundancies and follow up with the requirements of retrenchment? In the case of *Simelela & others v Member of the Executive Council for Education province of the Eastern Cape* (paragraph 24) which was decided before *SANDU* Francis AJ held that:

In addition to fair administrative action, State employees are afforded a Constitutional right to fair labour practices. Although the unfair transfer of an employee is not catered for in the LRA, an employee is not precluded from relying

directly on the Constitution to enforce his or her right not to be subjected to unfair labour practices.

Whilst the decision in *SANDU* clearly nullifies the direct reliance on the Constitution, as found in *Simelela*, one issue still remains clear; it is the fact that unfair transfers are excluded from the scope of unfair labour practices in section 186(2) of the LRA.

In the case of *Hlongwa v Minister of Justice, Kwa-Zulu Government* 1992 13 ILJ 338 (D) the former Supreme Court held that a public sector employee is entitled to a hearing by his superiors before a final decision to transfer an employee is taken. In the case of *Saloojee v Karen Mc Kenzie NO & others* 2005 3 BLLR 285 (LC) the Labour Court set aside a transfer on the basis that it was *mala fide*. Interestingly, the court held that the transfer had been effected for an ulterior purpose, and was accordingly *ultra vires* and a breach of the employee's right. I perceive this as just cause for including transfers effected on the basis of ill-motives as unfair labour practices. Regardless of the continual omission of transfers from the LRA scope of unfair labour practices, the Labour Court in the case of *Gray Security Services (Western Cape) (Pty) Ltd v Cloete NO & another* 2000 21 ILJ 940 LC held that the dismissal of employees for refusing to accept a transfer was procedurally unfair because the employees had not been consulted before the decision was made to transfer them. Transfers do not pose the last challenge to the omissions in section 186(2). The refusal to bargain is another key issue that must be dealt with from a principled perspective by the LRA. The discussion follows below.

Refusal to Bargain

The Labour Court under the 1956 LRA was prepared, where deemed appropriate to compel employers to bargain with unions, and to interdict bargaining tactics that were perceived to be unfair (*Metal & Electrical Workers Union of SA v National Panasonic Co* 1991 12 ILJ 533 IC. See also Thompson, 1987). The Constitution provides for a duty to engage in collective bargaining yet the LRA does not impose a duty to bargain, either to impasse or at all (Grogan 2009: 95). The Constitutional Court has affirmed that a duty to bargain may be judicially enforced if it arises from legislation or collective bargaining agreement. In *SANDU* (paragraph 42) the Constitutional court held that:

...a litigant who seeks to assert his or her right to engage in collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in

its protection of the section 23(5) right in the litigant's view, then that legislation should be challenged constitutionally (*SANDU*, paragraph 52).

In principle the refusal by an employer to exercise its constitutional duty to bargain was regarded by the court as a potential constitutional matter, as such refusal infringed upon employees' right to bargain collectively. Such employees though could not rely directly upon the general right to fair labour practices in the Constitution without at the same time attacking the constitutionality of the deficient statute. The above decision was reached on the basis that whilst the Constitution recognised the role of collective bargaining, there was no judicially enforceable duty to bargain for employers and employees (*SANDU*, paragraph 42). However the judgement in *SANDU* does not address whether such a duty arises from the LRA (Grogan, 2009: 99). The Supreme Court of Appeal decision stands as the guide to the effect that the LRA does not impose a duty to bargain. If it may be accepted that collective bargaining should mean negotiation in good faith between employer and employee or their representatives on all matters of mutual interest pertaining to the terms and conditions of employment to attain a fair industrial relations environment, it is submitted that a review of the current protection of the section 23 general right to fair labour practices in the LRA is required. The omissions in section 186(2) are not exhausted on the employee's side. They also extend to the employers. An analysis of that follows below.

Closed Shop Agreements

The closed shop agreement also poses an interesting debate in the concept of fairness. It raises questions such as whether the negative right to refuse to associate was implicit in the positive right of association. If so, can closed shops in one or other of their guises nevertheless be justified as constitutional under the limitation clause? In *Lavigne v Ontario Public Service Employees' Union*, 1991 (81) *Dominion Law Reports* (DLR) (4th) 545 (Here it was held that, by declining to become a member of the union, the individual dissociates himself from the union's activities. Forced payments in return for services thus entail no imposition of ideological conformity) the appellant asked the Canadian Supreme Court to strike down an agency shop agreement (Agency shops amount to an arrangement in which employees may refuse to become members of the union, but must nevertheless pay its dues). The basis of the challenge was that the funds so exacted were being used for purposes going beyond collective bargaining between the union and its employer. Though the challenge failed, the plurality accepted that freedom from association is a concomitant of freedom to associate.

The positive freedom of association safeguards the possibility of individuals, if they so wish, to associate with each other for the purpose of protecting common interests and pursuing common goals, whether of an economic, professional, political, cultural, recreational or other character, and the protection consists in preventing public authorities from intervening to frustrate such common action (See the Canadian case of *Lavigne v Ontario Public Service Employees' Union* 1991 81 DLR (4th) 545). It concerns the individual as an active participant in social activities, and it is in a sense a collective right in so far as it can only be exercised jointly by a plurality of individuals. The negative freedom of association, by contrast, aims at protecting the individual against being grouped together with other individuals with whom he does not agree or for purposes which he does not approve (See the case of *Young, James and Webster v United Kingdom* 1981 3 EHHR 38). It tends to protect him from being identified with convictions, endeavours or attitudes which he does not share and thus to defend the intimate sphere of the personality. In addition, it may serve the purpose of protecting the individual against misuse of power by an association and against being manipulated by its leaders. However strongly such protection of the individual may sometimes be needed, it is neither in logic nor by necessary implication part of the positive freedom of association.

In *Young, James and Webster v United Kingdom* 1981 3 EHHR 38 (In this celebrated case of *Young, James and Webster* was referred to the Court by the European Commission of Human Rights. The case originated in two applications against the United Kingdom (UK) and Northern Ireland lodged with the HR Commission in 1976 and 1977 under Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms by three United Kingdom citizens, Mr Ian McLean Young, Mr Noel Henry James and Mr Ronald Roger Webster. As such Commission ordered the joinder of the applications on 11 May 1978. In this case, it was held that it does not follow that the negative aspect of a party or person's freedom of association falls completely outside the ambit of Article 11 (art. 11) and that each and every compulsion to join a particular trade union is compatible with the intention of that provision. To construe Article 11 as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee) the challenge, which was mounted in the European Court of Human Rights, was to a conventional closed shop (In this arrangement, full trade union membership is a prerequisite to employment). Like the majority in *Lavigne*, the court held that "the right to freedom of association with others enshrined in Article 11(1) of the Convention embodied the negative freedom as well." The majority said that it would strike at the very substance of the freedom if the article were construed as permitting every sort of closed shop. In condemning the particular statutory regime that had

sanctioned the dismissal of the applicants, the court was at pains to say that the *per se* legitimacy of the closed-shop system was not under review. To forecast what the South African court will say on the issue is impossible. Closed shops are countenanced as legitimate elements in a statutory industrial council agreement (See Section 24(1) (x) of the labour Relations Act 28 of 1956. Their promulgation, though, is hedged round with restrictions; see Section 48(8) of the 1956 LRA) and they are quite prevalent. Disgruntled workers and rival unions are sure to want to challenge them.

Section 32 of the LRA of 1995 provides that a collective bargaining agreement drawn up in a bargaining council can be extended to cover non-parties within the scope of the council, thereby binding them to the terms of the agreement. It is clear that the implication is far reaching as non-parties' rights to collective bargaining would be limited added to removing such parties' rights to resorting to a collective job action or a strike action as a means of resolving the dispute. The courts accept that an agency shop agreement interferes with a person's constitutional right of freedom of association, and that strict compliance with the requirements for a valid agency shop agreement is therefore required (See *Greathead v SACCWU* 2001 3 SA (SCA) paragraphs 13-14 and *Solidarity & others v Minister of Public Service & Administration & another* 2004 ZALC 36 (LC) paragraphs 20-21). The key issue being that there is need to avoid the undue infringement of the rights of minority parties in such agreements and to justify such decisions as may limit the rights of the minority parties. By so doing the courts also acknowledge the need for the application of the rules of natural justice and fairness when approaching agency shops (Du Toit *et al*, 2003: 188).

Employers' Exclusion

Employers have also been excluded from the scope of protection against unfair labour practices in the LRA. The 1956 LRA applied unfair labour practices to include any act or omission other than a strike or lock-out which has the effect that, "the business of any employer or class of employers may be unfairly affected or disrupted." The employer must prove that an infringement of, or threat to any right entrenched in this Bill of Rights is alleged. The main attack which the employers, may have to launch on the constitutionality of section 186(2) of the LRA is that its provisions are inconsistent with the employer's right to fair labour practices as provided in section 23(1) of the Constitution. For the sake of brevity these rights will be referred to as 'the section 23(1) rights.' It has been submitted that the general right to fair labour practices is not limited to employees or the unfair labour practices provision in the LRA but that the right to fair labour practices is a right that is wider than the current employee-employer relationship. Such an approach is expressly

provided for in section 38 of the Constitution (Section 38(1) provides that: Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are: a) anyone acting in their own interest; b) anyone acting on behalf of another person who cannot act in their own name; c) anyone acting as a member of, or in the interest of, a group or class of persons; d) anyone acting in the public interest; and e) an association acting in the interest of its members). Section 38 lists five categories of persons that will have standing if there is an allegation that a right in the Bill of Rights has been violated or threatened; and the applicants can demonstrate, with reference to the categories listed in section 38(a) to (e), that there is sufficient interest in obtaining the remedy they seek.

An objective test has to be used to determine whether section 186(2) of the LRA or the LRA itself is either valid or of no force and effect to the extent of its inconsistency with section 23(1) of the Constitution (*Ferreira v Levin NO & others case*; *Vryenhoek & others v Powell NO* and another 1996 BCLR 441 (CC) paragraph 26). The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry into the position of employees who are party to a dispute in order to determine the validity of a section 186(2). The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. This we assume is the limitation that has led the Labour Court in the case of *NEWU* to deny employers the constitutional right to fair labour practices on the basis of wanting to protect the employee whom they generally perceive as a weaker party to the employment relationship. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.

However, before the matter can be heard, its justiciability must be ascertained especially where it is assumed that employers are more advantaged than employees (Constitutional Principle IV provides that the “Constitution will be supreme, and Constitutional Principles II and VII...provide that the fundamental rights contained in the Constitution will be justiciable”). An issue is justiciable if a court is not precluded from hearing a case, because the issue has become moot or academic or because it is not yet ripe for decision by a court. In the case of *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa* (at 1309) the Constitutional Court found that statutory provisions must be subject to the supremacy of the Constitution unless they are made part of the Constitution. This means that

section 186(2) of the LRA must comply with section 23(1) of the Constitution and must be subjected to amendment by special procedures as contemplated by Constitutional Principle XV or Constitutional review as contemplated by Constitutional Principles II and VII where the provision is not part of the Constitution. If section 23(1) of the Constitution is to be relied upon, there must be an infringement of or threat to a section 23 right (Section 7(4)(a) of the Constitution).

Section 23(1) right accrues, textually, only to ‘everyone’ undertaking labour practices. There are rights which accrue, in the subjective sense, for instance rights entitled to employees only, when the need to address imbalances in the workplace arise, such as the right to strike. The constitutional right to fair labour practices cannot be examined from such perspective. It would be a matter of pure speculation or generalisation to assume that only employees are disadvantaged hence the constitutional right is affordable to them and will only be extended to employers when the judiciary perceives them to be disadvantaged if ever such time will come. Even if there is an unfair labour practice against an employer committed by an employee as the weaker party to the employment relationship, (assuming for the moment that the right is an implied right in the larger category ‘everyone has the right to fair labour practices’) the right should not be automatically limited when the party alleging the unfair labour practice is an employer. In our view, it will also not be a defence to a charge of the unconstitutionality of the narrow LRA provision of unfair labour practices, to suggest that the right to fair labour practices is too wide to be construed by a single statute. This is an inappropriate argument particularly where the true meaning of the term ‘unfair labour practices’ is not given effect to under the current LRA. It is submitted that the true meaning of unfair labour practices was given effect to by the 1956 LRA. The 1956 LRA also protected the omissions such as transfers, unilateral variation to conditions of service amongst others that are currently prevalent in the current LRA. Such omissions have been discussed in this chapter. It is made worse when one considers the constitutional rationale for enacting the LRA. Employers are no longer classified as only large corporate companies but also individuals and smaller organisations whose rights must be protected. From this perspective, there is a threat to the section 23(1) right to fair labour practices. This is an inescapable conclusion.

In the case of *Nenu*, the court in analysing whether the right to fair labour practices should be extended to employers said:

... it is not thought that employers need any protection against unfair resignations by employees. The majority of workers in this country are still un-unionised and remain extremely vulnerable...the employer remains very

economically strong compared to an individual worker and the fact that this protection is afforded the employee but no similar protection is afforded the employer does not come anywhere near to diminishing the power that the employer has.

The court thus concluded that legislation that would give the employer protection would be a step backwards in the field of labour relations and employment law in South Africa. The court's view as we perceive it, is based on broad generalisations and ignores the provisions of the constitution which clearly affords employers the right to fair labour practice (*In re Certification of the Constitution of the Republic of South Africa*, paragraph 67). The same court decision seems to ignore the fact that it is a very broad generalisation to say that every employer is more powerful than its employees. The author Brassey (1990: 206) whilst writing about the Interim Constitution, in respect of a position that in my view is no different under the current Constitution argued that:

For seventy years our legislature has been modernizing our system of labour law, and for the last twenty years the labour courts have been doing the same under the aegis of the unfair labour practice. As a result, labour law already has a kind of charter of fundamental rights of its own...I tend to share the view that was expressed by McIntyre J in *Re Public Service Employee Relations Act*, the leading case on whether the (Canadian) Charter gives workers a right to strike: 'Labour law...is a fundamentally important as well as extremely sensitive subject. It is based upon a political and economic compromise between organised labour - a very powerful socio-economic force - on the one hand, and the employers of labour - an equally powerful socio-economic force - on the other. The balance between the two forces is delicate... Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time...Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems'.

The court seems to ignore the fact that the employer in terms of the Constitution is a juristic person who has capacity in law to sue and be sued (Brassey, 2003: 206). The manner in which an individual's rights are protected is the same manner in which the rights of an employer should be protected unless if such protection in the event of huge firms is regarded meaningless. However the fairness or not of the court's reluctance to uphold the employer's constitutional right to fair labour practice remains an academic argument. Martin Brassey and Carole Cooper (2005) argue that:

...in the labour field, the issue of the horizontal application of the labour relations rights to private citizens will be mainly academic. This is because existing labour legislation already regulates, to a large degree, private conduct between employers and employees. The horizontal reach of the labour rights will therefore extend to those matters falling within the scope of the rights but not covered by existing legislation. The exact extent of this reach is particularly unclear with regard to the right to fair labour practices because of its open-textured nature. Depending on the scope given to this right, potential areas for its application to private conduct relate to the duty to bargain (which has been deliberately excluded from labour legislation), employment issues beyond the confines of the employer-employee relationship, and employer-employee issues which may be regarded as fair labour practices but are not covered by legislation.

Scholars sympathetic to the western capitalist ideology therefore contend that the employer's rights are being limited by the approach of the courts and the scope of section 186(2). The dynamics of the employment relationship are changing due to globalisation (Landsbury 2003: 62-74). Many employers are in a situation where they are struggling to survive (Penalosa 2009: 1-5). In fact, many employers are forced by economic weakness to close down. This is likely to have an adverse effect to the economic growth of South Africa which could be easily avoided if the judiciary pays particular attention to the objective of the Constitution concerning the balancing of the interests of employers and employees.

In view of the above listed omissions, which are a result of the narrow conceptualisation of the right to fair labour practices in the LRA, it then is questioned whether the continual protection of legislation that limits the scope of protection offered by the Constitution, is still appropriate to achieve the constitutional objectives. It then is imperative to test whether the omissions in the LRA render it unconstitutional or they call for amendments. A wider manner of interpreting the statute will not be rendered as an option as this goes beyond the legislative intent. We will undertake to assess the impact of the legislative shortfalls of the LRA.

Is section 186(2) unconstitutional and inconsistent with the decolonisation agenda?

In the contemporary African societies, very few people are in the formal sector and very few of the employees in the formal employment have union backing and protection (*Pretorius and Another v Transport Pension Fund and Others* (42355/2015) [2016] ZAGPPHC 649 (5 August 2016)). Many more workers on the African continent are now finding themselves in complex employment

relationships as supposed “independent contractors”. Those at the forefront of encouraging such employment relationships are foreign business entities and/or successors in title of colonists who promote bind African workers to time-based employment subject to faceless multinational companies who may operate from a web presence. Such practices only enlarge the place of exploitative business practices and the legacy of colonialism. It is therefore imperative that provisions of the LRA must seek to eradicate the legacy of colonialism and not to preserve them. For the decolonisation agenda to succeed in South Africa’s labour market there is need to take a broad view of fair labour practices as provided for in section 23(1) of the Constitution.

The LRA not only tabulates a narrow list of what constitutes fair labour practices but places emphasis solely on workers employed in the formal sector. Such an approach undermines the decolonisation agenda. As such, it must be pointed out that a lot of legislative uncertainty has been propagated by the narrow construction of section 186(2) of the LRA. This has prompted the necessity of arguing whether this provision is indeed unconstitutional or ‘falls short’ of the constitutional requirement, if ever there is any ‘real’ difference in the two terms. The basis of the attack on section 186(2) of the LRA is that the section as held in the case of *Schoeman & another v Samsung Electronics SA Pty Ltd* 1997 10 BLLR 1364 contains a closed list of types of disputes of fair labour practices which cannot be interpreted beyond its current scope. In essence, this would be read to imply that the constitutional right to fair labour practices cannot be relied on to extend the limits set by the narrow statutory definition of fair labour practices in section 186(2) of the LRA (*Booyesen v SAPS* case, paragraph 37. In the case of *SAMSA v MacKenzie* [2010] 5 BLLR 488 (SCA) 2 paragraph 27 it was held that the LRA was enacted in order to give effect to the labour rights now guaranteed by section 23 of the Constitution and in particular the right to fair labour practices. The concept of an unfair labour practice is defined and limited in section 186(2). This stands in sharp contrast to the position under the 1956 LRA where the concept was originally undefined. Then the Industrial Court was vested with jurisdiction over, and responsibility for giving content to, the unfair labour practice. When constitutional protection against being subjected to unfair labour practices was introduced the LRA was enacted to give content to that constitutional right and did so by providing a definition of an unfair labour practice. Where an employee claims that they have been subjected to an unfair labour practice the LRA establishes the mechanism for resolving disputes arising from that claim. There is therefore no justification of excluding the constitutional concept of fair labour practices from the unfair labour practices scheme in the LRA”). The implication of such a legislative position is that all the above discussed non-statutory unfair labour practices are excluded from the scope of unfair labour practices. All these legislative

omissions must be viewed in light of the fact that the principal purpose of the LRA is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution (See Explanatory Memorandum to the LRA Bill. See also *Chirwa* case, paragraph 48).

Certainly, where a statute gives effect to a constitutional right, that statute must be relied on in the first instance in seeking a remedy for an alleged breach of the right (*Chirwa* case note 9, paragraph 47). If the statute is silent, it must be considered whether common law may be interpreted or developed in order to provide a remedy. If this is impossible, direct reliance on the constitution is permissible only if a party proves that such legislation falls short of the constitutional requirement. In *SANDU*, the Constitutional Court held that if a violation of section 23(1) is alleged for which the LRA makes no specific provision, the LRA will be falling short of the constitutional standard. This begs the question of what it implies to be ‘falling short’ of the Constitutional standard and whether there is any material difference with unconstitutionality. In attempting to address this question, Du Toit, without getting into an in-depth analysis of the matter, argues that there is a difference in unconstitutionality and falling short of the Constitution (Du Toit, 2009). Whether Du Toit’s view is correct can only be ascertained by analysing what it means to ‘fall short’ of the constitution. We shall analyse the concept of ‘falling short’ with a view to determining the constitutionality or otherwise of section 186(2) of the LRA.

The phrase ‘falling short’ from its plain meaning suggests two significant issues which are essential to this issue and cannot be ignored as such. Firstly, ‘falling short’ may imply a failure to attain a specified level or standard in a set objective (The American Heritage Dictionary of English Language 4th edition, 2009; Collins English Dictionary 5th edition, 2000; Oxford Dictionary of Current English, 2009). Secondly, the same concept may imply a deficiency and/or extent by which something is unable to meet a set standard or requirement (Ibid. However any such deficiencies must be closely analysed to establish whether their existence may not amount to a radical departure from the constitutional spirit and purport). The two meanings it may be argued are substantially different. The first definition denotes an inability to address a set standard which may be impermissible. The second definition may refer to a shortfall which may amount to a mere inadequacy to meet a set standard and may be adjusted to reach the required standard. Applied in the context of section 186(2) of the LRA, the first definition in my view, seems to suggest ‘inconsistency’ with the required standard. Related words for inconsistency are incompatibility, mutual exclusiveness and repugnance which all seem to suggest an impermissible deviation from a set standard or objective (Ibid). If this construction is correct, section 186(2) of the LRA by assuming a narrow construction of the constitutional right to fair labour practices which cannot be expanded is

inconsistent with the constitution' objective in section 23(1). The basis of this argument is that in the Constitutional Court in *NEHAWU* (paragraph 33H-I), held that the right was regarded as being wide and certainly not limited to unfair conduct by the employer relating to the promotion, demotion and probation.

The Labour Court held that section 186(2) does prevent a claim for any party attempting to extend the scope of fair labour practices beyond the current scope of section 186(2) of the LRA. It has already been argued that labour practices are so wide that restricting unfair labour practices to three issues would be misguided. It is as yet unclear why the legislature, under the current constitutional dispensation, arbitrarily limited employees' general right to fair labour practices by developing such an extremely narrow construction of the right when in essence the 1956 and 1988 definitions (in the LRA) were broader and more compatible with the objects of section 23(1) of the Constitution. It is submitted that the mischief the legislature sought to address in narrowing down section 186(2) is a mystery which begs justification.

The Labour Court argued, *obiter*, in *NEWU* that the constitutional right to fair labour practices is too narrow to be construed by a single statute. It then is questioned as to what extent the LRA as the principal labour statute must give effect to the constitutional right to fair labour practices and how that extent is determined? (The objects of the LRA Bill must be revisited for a clearer insight into this discussion. The object of the Bill was to eradicate the "inconsistency, unnecessary complexity, duplication of resources and jurisdictional confusion" caused by the multiplicity of laws by proposing a single statute that was to apply to the whole economy whilst accommodating the special features of its different sectors. See also *Chirwa* case, paragraph 48) The Constitutional Court in *Chirwa* seems to give guidelines to that by outlining the primary objects of the LRA (Ibid, paragraph 47, Skweyiya J states that the LRA must comprehensively (emphasis added) provides mechanisms and forums for dispute resolutions in respect to labour matters). It may be argued that section 186(2) does not give full effect to section 23(1) of the Constitution. The current restriction to section 186(2) LRA unfairly limits both employees and employers from obtaining remedies under the LRA, in respect of issues excluded by section 186(2). As held in *Chirwa*, the LRA was intended to be a one-stop shop for all labour-related disputes (Ibid). What really is the rationale for such a narrow construction of the right in such a principal labour statute? The Constitutional Court has yet to consider the constitutional validity of section 186(2) of the LRA, yet this shall not preclude an analysis of this issue.

Whilst section 186(2) does include a few forms of unfair labour practices, it clearly is not directed at satisfying a broader concept of fair labour practices beyond its current construction (There are a lot of issues that fall under the scope of labour practices as compared to the issues contained in the closed list

in section 186(2) of the LRA). It is this legislative bar which in my view is the origin of this potential constitutional grievance. The constitutional challenge at hand does not necessitate the development of the common law to give effect to the right but pre-eminently concerns the constitutional validity of section 186(2) of the LRA. It certainly must be asked why the far-reaching constitutionally driven legislative reforms authorised such a narrow legal construction of section 186(2) where the constitutional objective is broad? Does it not *per se* render the provision unconstitutional? Put differently, in the light of our constitutional setting, which legitimate purpose of government is advanced by the narrow construction of unfair labour practices in section 186(2)? All these questions must be addressed in light of the fact that in *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 BCLR 489 (CC) at paragraph 19 (The Court held that: “The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional) Parliament had to rationally draft legislation without arbitrarily limiting rights. The same is true of the exercise of public power by members of the executive and other functionaries. The Constitution places “significant constraints upon the exercise of public power through the bill of rights and the founding principle enshrining the rule of law” (*Pharmaceutical Manufacturers Association of SA and another: In re Ex Parte President of the Republic of South Africa and Others*, paragraph 83). The exercise of such power must be rationally related to the purpose for which the power was given (Ibid: paragraph 85).

Apart from addressing the narrowness of the scope of section 186(2) of the LRA, the situation is made worse if one considers that section 186(2) differentiates as it excludes the protection of a certain class of employees in certain instances from another class of employees in another instance yet the Constitution grants ‘everyone’ the right to fair labour practices (Employees with the unfair labour practices protected in section 186(2) of the LRA are at a better advantage than employees who are excluded. This is contrary to the constitutional objective as ‘everyone’ has a right to fair labour practices). Worse off, the same provision partially protects (through its narrow construction) and then limits (through the exclusion of other labour practices) the constitutional right to fair labour practices of the same right bearer (This is obviously attributed to section 186(2)’s narrow construction. In essence the LRA provision limits the same right bearer’s entitlement to the broader general right in section 23(1) of the Constitution). We perceive an element of a self-contradictory provision which on one hand protects and on the other hand limits (by exclusion) the protection of legal subjects in respect to the same concept, ‘constitutional right

to fair labour practices' unless if the general right is limited, of which we do not assume so (Legislation must not infringe any of the fundamental rights enshrined in the Bill of Rights. (*President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at paragraph 13; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (10) BCLR 1059 paragraph 148). The rights in the Bill of Rights may, however, be limited by a law of general application. But such a limitation is limited by the limitations contained in section 36(1) of the Constitution or elsewhere in the Bill of Rights. Section 7(3) of the Constitution provides, "The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill." A limitation that does not comply with such limitations, infringes the right in question). The reason for this is that the limitations in section 186(2) do not amount to a mere exclusion of non-statutory unfair labour practices (See *Affordable Medicines Trust and others v Minister of Health and another* 2005 6 BCLR 529 (CC) paragraph 73. In this case it was held that, "Legislation that regulates practice will pass constitutional muster if it is rationally related to the achievement of a legitimate government purpose"). Instead, section 186(2) arguably has become a silent source of the narrow construction of unfair labour practices in the LRA since it not only assumes a closed list of unfair labour practices but also limits the broad constitutional objective to fair labour practices (By admitting that the scope of fair labour practices is narrow, Landman J's through his decision in *NEWU unwittingly* submits to an inadequate representation of the broader constitutional objective in section 23(1) by section 186(2) of the LRA. The basis of this argument is the decision taken by Skweyiya J in *Chirwa* as already discussed).

It is submitted that where 'everyone' has a constitutionally protected right to fair labour practices, legislation that is narrowly drafted in a manner as to discriminate against a certain class of employees from other employees, or the same employee in respect of different labour practices through preferring certain unfair labour practices over others, should raise a constitutional issue (*Affordable Medicines* case, paragraph 73. Legislation must not infringe any of the rights in the Bill of Rights. What the Constitution therefore requires is that the power to regulate be exercised in an objectively rational manner. As long as the regulation of the practice, viewed objectively, is rationally related to the legitimate government purpose, a court cannot interfere simply because it disagrees with it or considers the legislation to be inappropriate). In my view, section 186(2) does differentiate. On a plain reading it denies employees subjected to unfair labour practices remedies in respect of those practices omitted from its scope from obtaining remedies in the LRA. The omissions in section 186(2) it may be argued also breach the equality guarantee in the Constitution (See section 9(1) of the Constitution). In the first instance, section

186(2) infringes the right to equal protection and benefit of the law under section 9(1) of the Constitution because it does not further a legitimate government purpose (If section 186(2) of the LRA served a legitimate government purpose, it would have been drafted in line with the government's objects in the Memorandum to the Bill which effectually is to have litigants approaching the LRA structures to resolve labour disputes and to make it a one-stop shop for all labour-related disputes. (Emphasis added)). In the second instance, it constitutes unfair discrimination under section 9(2) of the Constitution because it is based on an extremely narrow construction of unfair labour practices, a legislative feature which falls far short of the objective envisaged in section 23(1) of the Constitution (Section 9(2) provides that: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken"). The content of section 186(2) which objectively must protect the disadvantaged employee seems to be the source of such disadvantaging.

In our view, it seems plain that the narrow construction of unfair labour practices made by section 186(2) is not about a protectable interest or burden that attaches to the need to give effect to the constitutional right to fair labour practices in other pieces of legislation (Landman J in *NEWU* held that, "Workplace practices that are not regulated by labour legislation might infringe the broad protection offered by section 23 of the Constitution and constitute an unfair labour practice"). The distinction created by section 186(2) is in essence a technical legislative omission by commission, of the true objectives of section 23(1) of the Constitution (Section 3(b) of the LRA requires that it should be interpreted in compliance with the Constitution). This is not a case where statutory law's omissions should be condoned to the extent of withholding from employees a protection or right which is granted in the Constitution to the same parties in a wider sense. Where is the supremacy of the Constitution in this regard? The challenged provision merely regulates a handful of unfair labour practices and omits the rest without applying a provision that may allow for an inclusion of unfair labour practices as may be deemed necessary by the courts from time to time (See section 186(2) of the LRA). It is questioned whether the narrow construction of unfair labour practices brought into being by section 186(2) of the LRA evinces a rational connection to the governmental purpose proffered to validate it. In the case of *Prinsloo v Van der Linde and Another* 1997 6 BCLR 759 paragraph 25, though not relating to labour law, it was held that the state:

...should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state... This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation (Ibid paragraph 24. It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of its entire people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination).

It is so that laws rarely prescribe the same treatment for everyone (Ibid paragraph 24. It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of its entire people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination). Yet it bears repetition that when a law elects to make differentiation between people or classes of people (employees) it will fall foul of the constitutional standard of equality, if it is shown that the differentiation does not have a legitimate purpose or a rational relationship to the purpose advanced to validate it (See *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC); 2004 (6) SA 121 (CC) at paragraph 52; *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC); 2001 (1) SA 1 (CC) at paragraph 29). Remove the pre-condition of a rational connection between section 186(2) of LRA and section 23(1) of the Constitution, the former section infringes, at the outset, the right to equal protection and benefit of the law under section 9(1) of the Constitution (Without even looking at employers' legitimised discrimination, section 186(2) discriminates employees' right to fair labour practices by regulating a handful of unfair labour practices. An employee who will not experience an unfair labour practice in section 186(2) but a non-statutory unfair labour practice like an unfair transfer, might just as well be at an unequal footing than a colleague who has an unfair labour practice in the narrow section 186(2)). The legislative scheme in my view confers a narrow construction of unfair labour practices in the LRA and/or imposes an unevenly and without a rational criterion or basis for such limitation (There is no real

justification as to why section 186(2) is narrowly constructed. However when one considers that the 1956 LRA protected some unfair labour practices such as unfair transfers and bad faith bargaining, there is enough evidence that their omission was deliberate. This in my view may be a legislative oversight since employees' rights have to be effectively protected in line with the objects of the Constitution, particularly when one considers the volatile labour environment in the pre-constitutional era). That would be, an arbitrary limitation of a right which neither promotes public good nor advances a legitimate public object. In this sense, section 186(2) of the LRA would be inconsistent with the equality norm that the Constitution imposes, inasmuch as it breaches the 'rational differentiation' standard set by section 9(1) thereof (Of course the constitutional requirement of a rational connection between a law and its avowed purpose has its source in section 2 of the Constitution which provides that it is the supreme law and that law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. On the rational connection requirement in all law, whether it differentiates or not, see *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (4) BCLR 347 (CC)). The most perceptible conclusion under this instance would be to imply that section 186(2) of the LRA is unconstitutional.

On the contrary, if 'falling short' is taken to mean deficiency, then section 186(2) may be regarded as inadequate in respect to the constitutional objective. The term inadequate implies insufficiency (The American Heritage Dictionary of English Language 4th edition 2009 Houghton Mifflin Company). Should this construction be correct, it implies that section 186(2) of the LRA is yet to be developed to the level required by the Constitution. To achieve such an objective, section 186(2) of the LRA must be amended to give full effect to section 23(1) of the Constitution. As will be discussed, the only ideal option is an amendment. A look at the first option, reading-in shows that it is not possible to use interpretation techniques to cover this legislative gap (The existence of a *numerus clausus* of unfair labour practices in section 186(2) prohibits the use of interpretative methods to remedy this legislative shortfall). Section 172(1) (Section 172(1) reads: "When deciding a constitutional matter within its power, a court - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including - (i) an order limiting the retrospective effect of the declaration of invalidity) of the Constitution makes it plain that when deciding a constitutional matter within its power, a court must declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency. Section 98(5) of the Constitution provides as follows:

In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.

The Constitutional Court in the case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at paragraph 74 has had this to say about the appropriate remedy of rectifying the legislative shortfalls of a statute:

... In deciding whether words should be...read into a provision, a Court pays careful attention first, to the need to ensure that the provision which results fromreading words into a statute is consistent with the Constitution and its fundamental values and, secondly, that the result achieved would interfere with the laws adopted by the Legislature as little as possible.

In *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) paragraph 57 the Constitutional Court reiterated the reasoning of Ackermann J in the *Gay and Lesbian Equality* case and said the following about statutory interpretative tools:

Reading down, reading in, severance and notional severance are all tools that can be used either by themselves or in conjunction with striking out words in a statute for the purpose of bringing an unconstitutional provision into conformity with the Constitution, and doing so carefully, sensitively and in a manner that interferes with the legislative scheme as little as possible and only to the extent that is essential. There is no single formula. In appropriate cases it may be necessary to delete words from a provision and read in other words to make the provision consistent with the Constitution, where the deletion of the words alone would result in the declaration of invalidity to an extent greater than that required by the Constitution.

However, in *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) paragraph 123 the Constitutional Court (per Ngcobo J writing for the entire Court) cautioned against judges playing a legislative role in these terms:

A court should be reluctant to read in or sever words from a provision if to do so would require the court to engage in the details of lawmaking, a constitutional activity that is assigned to legislatures. Similarly, where curing a defect in the provision would require policy decisions to be made, reading in or severance may not be appropriate. So too where there are a range of options open to the Legislature to cure a defect. This Court should be slow to make choices that are primarily to be made by the Legislature.

The issue of using interpretive methods seems to be of no relevance in this matter. The courts have already determined that section 186(2) contains a closed list of unfair labour practices hence it cannot be construed beyond its legislative scope (*Schoeman case supra*). The CCMA in the case of *Govender v Dennis Port (Pty) Ltd* 2005 ILJ 26 at 2239 (In this case the applicant was placed on short-time while absent from work owing to illness. The reasons given by the employer were that the industry was going through a tough time and there was no work. The employee alleged an unfair labour practice and sought payment of his normal remuneration in respect of the short-time period) whilst working on the understanding developed by the Constitutional Court to the effect that the right to fair labour practices is incapable of a precise definition (*NEHAWU*, paragraph 33H-I), sought to extend the scope of section 186(2) of the LRA. The CCMA had ruled that section 186(2) did not contain a closed list and that it could and should be developed. However, the Labour Court in the *Schoeman* case held that section 186(2) contains a closed list (*Schoeman case supra*). This is submitted to be the correct position. In that sense the constitutional right to fair labour practices cannot be used to extend the limits of the statutory definition in section 186(2). In the *Naptosa case* (paragraphs 894F-H and 896E-897E) the High Court before the advent of *SANDU* and *Booyesen* cases held that direct reliance on the Constitution should be avoided as this would lead to the development of two streams of jurisprudence.

In *Moloka v Greater Johannesburg Metropolitan Council* (paragraphs 12-13) the Labour Court declined jurisdiction in a claim for increased remuneration based directly on section 23(1) of the Constitution on the basis that the section could not be relied upon to grant an employee a benefit to which she is not entitled as of right (*Ibid*). This takes us to the point that if interpretative methods are not the ideal solution for eliminating the limitations imposed on the scope of unfair labour practices in the LRA, by the narrow construction of section 186(2), then the appropriate course would be to amend the LRA to give effect to its shortcoming in respect to the constitutional right to fair labour practices. Clearly, the argument made in this work concerning the implication of legislation falling short of the constitutional requirement, shows an imaginary existence of the difference between inadequacies as opposed to an inconsistency

with the constitutional objective by section 186(2) of the LRA. It is only proper that a realistic approach that acknowledges the direct affront of section 186(2) of the LRA on the constitutional objectives be taken. The effect of such an approach would be to amend the LRA to resolve this legislative gap. This is the position that this research advocates for.

Implications of Legislation Falling Short of the Constitutional Right to Fair Labour Practices

Legislation that infringes or threatens the existence of a right protected in the Bill of Rights may be challenged as being unconstitutional (Section 38 of the Constitution). The Constitutional Court is yet to address this matter in respect to the existing labour legislation, in particular the narrowly constructed section 186(2) of the LRA. The question of a piece of legislation or its provision falling short of constitutional requirements starts with reference to the general principles of the operation of the Constitution (Van Der Westhuizen J in a recently decided case of *Vuyile Jackson Gcaba v Minister of Safety and Security & others* case CCT 64/08 2009 ZACC 26 paragraphs 55-56 (The case was decided on 7 October 2009) looks at the key principles that must be acknowledged when drafting legislation. He provides that; "... it is generally accepted that human rights are intrinsically interdependent, indivisible and inseparable. The constitutional and legal order is one coherent system for the protection of rights and the resolution of disputes. A related principle is that legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of constitutional rights. However, another principle or policy consideration is that the Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law. Therefore, a wide range of rights and the respective areas of law in which they apply are explicitly recognised in the Constitution"). The rights of all natural and legal persons are contained in the Bill of Rights (Chapter 2 of the 1996 Constitution). It is the requirement of the Constitution that the State respects, protects, promotes and fulfils the rights contained in the Bill of Rights (Section 7(2) of the 1996 Constitution). The rights of interest in this instance would be the labour relations rights, freedom of expression, occupation and profession, freedom of trade, picket and petition, and the freedom of assembly. However, a limitation is placed on the rights contained in the Bill of Rights by making the rights subject to the limitations contained or referred to in section 36 or elsewhere in the Bill (Section 7(3) of the 1996 Constitution). In this instance, the ambit of the right or rights violated must be determined (Du Toit, 2009: 67).

If the unconstitutionality of a provision in any Act is to be proven, (in this case section 186(2) of the LRA) it should be shown that a right in the Bill of

Rights has been limited and that this limitation is not justifiable in terms of the provisions that appear in section 36 or elsewhere in the Bill (*Affordable Medicine Trust and others v Minister of Health and another* 2005 6 BCLR 529 (CC) paragraph 73. See also *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at paragraph 13; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); at paragraph 148). Emphasis will be placed on the LRA because the EEA developed its unfair discrimination scheme in line with the repealed provision of item 2 schedule 7 of the 1995 LRA. The EEA also does not use the concept of unfair labour practice as envisaged in the LRA. The same test can be applied in respect of the BCEA. However in my view it is not imperative to test the constitutionality of BCEA provisions at this stage as the BCEA's application should be in conformity with the approach of the LRA. The way is now open to consider the constitutional validity of section 186(2) of the LRA. The ground of constitutional inconsistency in this hypothetical case is a narrow protection of the right to fair labour practices in section 186(2) of the LRA. Its narrowness will not be limited to its lack of protection to employers but also the non-statutory unfair labour practices discussed in this chapter. We will start by analysing the concept of the application of the Bill of Rights.

Application of the Bill of Rights

The Constitution of the Republic of South Africa deals with the application of the Bill of Rights (Section 8). There are two basic questions that arise which are dealt with in relation to the application of the Bill of Rights. It must first be determined as to who is protected by the Bill of Rights. The Bill of Rights protects everyone (Section 9 (1) of the Constitution. It provides that; "Everyone is equal before the law and has the right to equal protection and benefit of the law"). The Constitution further provides that equality includes the full and equal enjoyment of all rights and freedoms (Section 9 (2)). The Constitution then provides that "everyone has the right to fair labour practices" (Section 23 (1)). This prompts a basic and obvious question as to what the Constitution means by 'everyone'. This is a crucial question to this work as it determines whether employers as juristic persons and not only human beings also deserve the right to fair labour practices. Addressed in a different manner, the question to be posed is whether the term 'everyone' refers only to human beings or it also refers to juristic persons such as businesses and other employers? While the Constitution does not define the meaning of the word 'everyone', it seems to provide an answer to this question. In section 8(4), it provides that: "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person".

The construction of the above provision, in my view, indicates that as long as the nature of the right makes it possible for the juristic person to benefit from the right, the juristic person is entitled to it. This would imply that employers should have the right to fair labour practices by employees and should be able to register their disputes against employees at the Commission for Conciliation Mediation and Arbitration for breaching fair labour practices rights of the employer. In principle, both the juristic person and the human being are protected by the Bill of Rights.

The above construction to the concept ‘everyone’ leads to the second question. The question seeks to determine whether the Bill of Rights applies to the law or conduct that is being challenged (Du Toit, 2009: 67). The Bill of Rights binds the legislature, the executive, the judiciary and all organs of state (Section 8(1)). According to section 8(2), a provision of the Bill of Rights only applies to the conduct of a private person or a legal person to the extent that the provision is applicable, while taking into account the nature of the right and the nature of any duty imposed by the right. The phrase “to the extent that the provision is applicable” in my view implies two things. The first, understanding is that the provision protected in the Bill of Rights must be given its full effect in terms of the guidelines as set in the Constitution (*S v Zuma & others* 1995 4 BCLR 401 (CC) at 41. In this case it was held that a constitutional right that has been conferred without express limitation such as the general constitutional right to fair labour practices should not be cut down by reading implicit restrictions into it so as to bring such right in line with common law) and/or secondly, that the right as protected is subject to a limitation, as no right is absolute (Section 36(1) of the Constitution. Limits on rights must be reasonable and must have an important objective. Limits to such rights should also be less restrictive. The limitation of rights is not a process that is akin to South Africa only. The limitations clause under section 36 may also be compared to similar clauses in the *European Convention on Human Rights*. Specifically, there are limits on privacy rights (Section 8(2)), “except such as is in accordance with the law and is necessary in a democratic society”, limits on freedom of thought and religion article 9(2), subject only to such limitations as are prescribed by law and are necessary in a democratic society. In Canada a *Canadian Charter of Rights and Freedoms* was adopted in 1982. Section 1 of that *Charter*, like section 36 of the South African law, states that rights are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society). The reason for this is that, in respect to the first understanding, section 8(3)(a) requires a court to develop common law to the extent that legislation does not give effect to a right protected in the Bill of Rights. This should mean that instead of condoning the current limitations imposed by section 186(2) of the LRA, the courts must be passing judgements that seek to develop the scope

of coverage of constitutional right to fair labour practices in the LRA. In respect to the second understanding, section 8(3)(b) calls upon the courts to develop rules of common law to limit the right in the Bill of Rights, in this case the right to fair labour practices, provided that the limitation is in accordance to section 36(1). As at present, no such rules have been developed in respect to the narrow construction of the right to fair labour practices in the LRA or its limitation to employees only. On that basis, the second understanding takes the argument to the next stage which is the substantive stage. This is the stage which determines whether the current limitation to the scope of unfair labour practices in the LRA is justifiable.

The Substantive Stage

The court, at the substantive stage, is concerned with the substance of the applicant's allegation that a right has been infringed by law or by the conduct of the other party. The court in this instance must first determine whether the LRA infringes a fundamental right of parties to the employment relationship or not. A fundamental right is any right listed in sections 9 to 35 of the Bill of Rights (See Chapter 2 of the 1996 Constitution of South Africa). In that perspective, section 23(1) of the Constitution is a fundamental right. In order to determine, whether section 186(2) of the LRA is inconsistent with the general constitutional right to fair labour practices in section 23(1) of the Constitution, it would be necessary, as a matter of construction, to define or circumscribe the section 23(1) right to the extent necessary for purposes of this decision. However, as was held in the case of *NEHAWU* (paragraph 33 H-I) the right is not capable of a precise definition and is applicable subject to the prevailing circumstances.

The Constitution has neither offered a definition for the constitutional right to fair labour practices nor has it developed any guidelines of how the right must be construed (Ibid, paragraph 33H-I. The Constitutional Court declined to essay a precise definition of the constitutional right to fair labour practices and held that its focus was generally speaking the employment relationship between employer and worker). It is obviously unwise and undesirable (if not impossible) even to attempt an exhaustive or comprehensive definition or circumscription of the right designed to hold good indefinitely and for all further cases. Yet, even if the exact nature and boundaries of the right are to be defined on a case to case basis, some attempt must be made at this stage to determine the meaning, nature and extent of the right. As part of this enquiry it is also necessary to determine more precisely what it is about the nature and operation of the of section 186(2) of the LRA, and its impact upon the employment relationship, which can be said to be inconsistent with the constitutional right to fair labour practices which is granted to everyone. This must be analysed from the

backdrop of the decision taken in the case of *S v Zuma & others* where the Constitutional Court stated that: “Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them in line with the common law.”

An interpretive approach would have been ideal for this purpose. The reason for this is that, an interpretive approach whilst paying due regard to the language that has been used in a statute, is generous and purposive and gives expression to the underlying values of the Constitution (*S v Makwanyane & another* (CCT3/94) [1995] ZACC 3, paragraph 9). Cooper argued that a wide reading of the right is particularly relevant in so far as persons on the margins of the employment relationship are concerned (Cooper, 2005: 202). However due to the closed list of ‘unfair labour practices’ in section 186(2) of the LRA, the interpretative approach is not applicable. This leaves an amendment to the LRA as the only most feasible solution at hand.

A clear exposition of the nature and extent of the right to fair labour practices has already indicated that the right is accorded to ‘everyone’ whilst section 186(2) affords the protection to employees only. Nowhere in the Act is there any basis for protection of employers, nor does the Act extend itself satisfactorily to unilateral variation of conditions of service, transfers, pensioners, and the refusal to bargain (Grogan, 2009: 87-99). All these areas fall under the concept of labour practices which is a broad concept (Cooper, 2005: 206-212), and cannot be protected in a narrow manner in which the section 186(2) of the LRA does. This construction must be read in light of the importance of the Constitution which was given in the case of *Makwanyane* (paragraph 9) as follows:

In some countries the constitution only formalises, in a legal instrument, an historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different; it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and vigorous identification of and commit to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.

The element of fairness indicates that both parties’ interests should be considered. However fairness as a concept does not identify where the balance between the interests of the parties should be marked in any circumstance (Cooper, 2005: 213). A consideration of the constitutional values seems to suggest that the protection of the vulnerable creates fairness (*Hoffman v South African Airways*, paragraphs 18H-19A). International law also gives an

impression into the concept of fairness. As Cooper argues, International Labour Organisation (ILO) conventions are critical to the determination of balancing employers and employees interests (Cooper, 2005: 213). Some ILO conventions emphasise the protection of workers' rights hence implying that the protection of workers' rights is of greater emphasis (See the Termination of Employment Convention No. 158 of 1982. This convention sets out the guidelines for effecting a fair dismissal. The constitutionality of LRA provisions on dismissals can be tested with reference to this convention). Other ILO conventions offer equal protection for employers and workers as the notion of fairness does not exclude the commercial rationale (See the Freedom of Association and Protection of the Right to Organise Convention No. 87 of 1948 and the Right to Organise and Collective Bargaining Convention No. 98 of 1949). It becomes clear that it is not possible in all circumstances to fully harmonise the interests of employers and workers in respect of a right protected in the Bill of Rights, and to give effect to such right in statutes in a given case, requires the interests of one party to be limited in favour of another. The author Berlin once stated:

... since some values may conflict intrinsically, the very notion that a pattern must in principle be discoverable in which they are all rendered harmonious is founded on a false *a priori* view of what the world is like. If ... the human condition is such that men cannot always avoid choices ... [this is] for one central reason ... namely, that ends collide; that one cannot have everything ... The need to choose, to sacrifice some ultimate values to others, turns out to be a permanent characteristic of the human predicament (Berlin 1969: 121).

Although Berlin's views pertain to the field of political and moral philosophy, they are in my view equally applicable, to constitutional interpretation and adjudication, where one substitutes some over-all pattern of the norms and values of the Constitution for an over-all pattern of a desirable form of personal or social life. Applied to the LRA, employers' commercial interests are substituted to guarantee a central concern of employment law, which is workers' protection (Davies & Freedland 1983: 18. The authors state that: "The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation, legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether must be seen in this context"). Berlin proceeded to state:

If we wish to live in the light of reason, we must follow rules and principles; for that is what being rational is. When these rules or principles conflict in concrete cases, to be rational is to follow the course of conduct which least obstructs the general pattern of life in which we believe. ... Even those who are aware of the complex texture of experience, of what is not reducible to generalisation or capable of computation, can, in the end, justify their decisions only by their coherence with some over-all pattern of a desirable form of personal or social life, of which they may become fully conscious only, it may be, when faced with the need to resolve conflicts of this kind. If this seems vague, it is so of necessity (Berlin 2005: 121).

Berlin's arguments seem to suggest that there may be a justifiable reason for limiting the protection of employers' right to fair labour practices in the LRA. Section 36(1) of the South African Constitution points to the norms and values which underlie an open and democratic society based on freedom and equality (See Chapter 2 in the Bill of Rights). As a prerequisite for the limitation of rights entrenched in the Bill of Rights, section 36 provides that such limitation will be permissible only to the extent that it is "justifiable in an open and democratic society based on freedom and equality". However, labour rights are not always reconcilable and in concrete situations difficult choices may have to be made, because section 36(1) does not provide an obvious answer to the choice between employers and employees interests nor does it determine which labour practices are to be excluded from the scope of coverage of the LRA in preference of which labour rights. However, the limitation should not cause costs that are disproportionate to the benefits that are obtained. This will occur when a law limits rights that are of great importance in the constitutional scheme in the name of achieving benefits that are comparatively less important. It will also occur when the law does unnecessary damage to fundamental rights, which could be avoided or minimised by using other means to achieve the same goal (De Waal 2004: 159). We submit that this is the case in respect of employers' right to fair labour practices at this point. This argument most importantly is raised in regard to section 64(4) of the LRA concerning the arbitrary exclusion of unilateral variation of conditions of service (*Monyela & others v Bruce Jacobs t/a LV Construction* 1998 19 ILJ 75 (LC)), pension rights (*Meyer v Yskor Bpk* 1995 16 ILJ 864 (LAC)). In this case the appellant was held to have no right of action because his case lay against a pension fund, not against his employer. In analysing this case, the author Grogan, 2009: 91 states: "...there is a lacuna in labour legislation concerning the pension benefits of employees"), transfers (Grogan 2009: 94) and the refusal to bargain (*SANDU*, paragraph 42) from the scope of unfair labour practices in the LRA. These non-statutory unfair labour practices have already been discussed in this chapter. It is these omissions which like the omission of employer's rights must subject section 186(2) to legislative

review. As already argued, there is no just cause for the arbitrary limitation of employee's rights in the LRA. Therefore the development in the scope of the protection of the constitutional right to fair labour practices in the LRA must be reviewed in respect of employees' rights for fair labour practices.

Conclusion

The right to fair labour practices is a crucial legal mechanism aimed at robustly addressing colonial injustices in the South African labour market. Contemporary evidence suggests that there has been a very slow process of closing the inequality gap due to labour market injustices which are prevalent in South Africa and are largely driven by multinational corporations. There is therefore need to decolonise the South African labour market to ensure the equitable redress as well as individual and collective restoration of the human dignity and resources of the disposed African indigenes (Atuahene, 2014). The right to fair labour practices is central to the decolonisation agenda. Workers must be protected from exploitation and be given a just share of the South African economy in pursuit of distributive justice. The era of an egalitarian political economy in which multinational corporations continue to benefit at the expense of African workers must now come to an end.

The discussion on the right to fair labour practices advanced in this chapter, affirms the importance of developing a consistent approach to the concept of fair labour practices, by the legislature and as between the Constitutional Court and the Labour Court as well as the CCMA in order to foster fairness in the South African labour market. This approach should resonate with the central imperative of the Bill of Rights and the transformation and/or decolonisation agenda to protect labour rights and the marginalised in the South African labour market and extending the application of the right to fair labour practices to collective bargaining as was the case in the 1956 LRA. The effect of this is an interpretation of the right to fair labour practices that, while it takes into consideration the interests of both workers and employers, does not hold those interests to be strict. However where rights are involved, they should not be regarded as if they are mere interests. In that sense, the right to fair labour practices must not be left vague and broad to the extent that litigants are unaware of the ambit of the right. It is therefore proper to end this chapter with Deakin's plausible remark as follows:

In a capitalist (or market) economy, based on 'free' (non-slaved or indentured) labour and the simultaneous separation of wage earners from the means of production, the human person as such is no longer a commodity, but labour power, or the capacity to work, is precisely a commodity which many labour law rules on

such matters as wage and job security, training and equality in work are designed to protect. A clearer recognition of this duality might help in making the idea of personality in work a useful one for the future development of labour law. The relationship between this important precondition and the emerging literature on capitalism's dependence on unfreedom is part of what this comment calls upon us to explore, in historical and contemporary context (Deakin 2013: 135).

It is therefore imperative that the narrow context of the LRA be broadened to suit the constitutional and decolonisation objectives. A transforming Africa must not be seen to retain legislation that is reflective of any such laws as may have been enforced during one of Africa's darkest phases. The legacy of colonialism and apartheid still subsists hence there is need to review the LRA and how it recognises the right to fair labour practices in a decolonising and/or transforming South Africa.

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The emergent so-called “Fourth Industrial Revolution” is regarded by some as a panacea for bringing about development to Africans. This book dismisses this flawed reasoning. Surfacing how “investors” are actually looting and plundering Africa; how the industrial internet of things, the gig economies, digital economies and cryptocurrencies breach African political and economic sovereignty, the book pioneers what can be called anticipatory economics – which anticipate the future of economies. It is argued that the future of Africans does not necessarily require degrowth, postgrowth, postdevelopment, postcapitalism or sharing/solidarity economies: it requires attention to age-old questions about African ownership and control of their resources. Investors have to invest in ensuring that Africans own and control their resources. Further, it is pointed out that the historical imperial structural creation of forced labour is increasingly morphing into what we call the structural creation of forced leisure which is no less lethal for Africans. Because both the structural creation of forced labour and the structural creation of forced leisure are undergirded by transnational neo-imperial plunder, theft, robbery, looting and dispossession of Africans, this book goes beyond the simplistic arguments that Euro-America developed due to the industrial revolutions.

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